92-1037

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

RALPH J. MILLER, M.D.,

Petitioner,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HEALTH; H. ARNOLD MULLER, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a physician who has presented direct evidence of actual injury to competition must also establish the defendants' market power in order to avoid a summary judgment dismissing his antitrust claim under Section 1 of the Sherman Act.

II. Whether a physician must establish the defendants' market power in order to satisfy the "dangerous probability of success" element of an attempt to monopolize claim under Section 2 of the Sherman Act where he has presented direct evidence of predatory conduct, anticompetitive intent, and actual injury to competition.

III. Whether the district court abused its discretion in refusing to consider expert market share testimony proffered by Petitioner after the date set by pretrial order where such refusal effectively resulted in summary judgment against Petitioner and where the record fails to demonstrate (1) willful disregard of the pretrial order, (2) prejudice to Respondents, or (3) that other less severe sanctions would not have been equally effective in curing any alleged prejudice.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were Petitioner, Ralph J. Miller, M.D., and Respondents Indiana Hospital, Henry F. Hild, Donald F. Smith, William R. McMillen, John S. Simpson, Thomas S. Barbor, Samuel W. Jack, Jr., Mrs. C. Fred Hildebrand, Mrs. Wanda M. Weyandt, Harry C. McCreary, C. Wilmer Johnston, George M. Evans, Donald S. Brody, Joseph Kovalchick, William G. Evans, M.D., Melvin C. Williams, M.D., Robert G. Goldstrohm, M.D., David C. Hughes, M.D., Ralph F. Waldo, M.D., Herbert L. Hanna, M.D., Richard N. Freda, M.D., Frank Weiner, M.D., Henry Mitchell, M.D., and Ralph R. Brown, M.D.

Respondent Indiana Hospital, a corporation, is a subsidiary of Indiana Healthcare Corporation. Indiana Healthcare Corporation also has as subsidiaries Indiana Health Care Foundation and Indiana Hospital Properties, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ralph J. Miller, M.D., respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit, entered in the proceeding below on August 11, 1992.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit dated August 11, 1992, is unreported and is reprinted in the Appendix at A1.

The Memorandum Opinion and Judgment Order of the United States District Court for the Western District of Pennsylvania dated March 9, 1992, have not been reported. They are reproduced in the Appendix at A3.

The Order of the United States District Court for the Western District of Pennsylvania dated February 19, 1992, refusing the expert testimony proffered by Petitioner, has not been reported but is reproduced in the Appendix at A31.

Also reproduced in the Appendix, at A47, is the Third Circuit's Order denying the petition for rehearing. In addition, the Opinion of the United States Court of Appeals for the Third Circuit entered March 31, 1988, which is reported at 843 F.2d 139, is reproduced in the Appendix at A33.

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit affirming the district court's grant of summary judgment was entered on August 11, 1992. A timely petition for rehearing with a suggestion for rehearing *in banc* was denied on September 16, 1992.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, in conviction thereof, shall be punished by fine not exceeding $10,000,000.00 if a corporation, or, if any other person, $350,000.00, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000.00 if a corporation, or, if any other person, $350,000.00, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This suit was filed by Petitioner, Ralph J. Miller, M.D., nearly twelve (12) years ago, in an effort to obtain relief from the ongoing concerted actions of the Respondents to curtail Dr. Miller's medical holdings and services in the health care industry in Indiana County, Pennsylvania. The Respondents are Indiana Hospital and various Hospital administrators and medical staff members. Their conduct is alleged to be in violation of the Sherman Act, 15 U.S.C. §§1 and 2, and relief therefrom is sought pursuant to the Clayton Act, 15 U.S.C. §§15 and 26. The essence of Miller's antitrust claims is that the individual Respondents conspired with each other and the Hospital to eliminate Miller and his Indiana Medical Center as competitors, primarily by revoking his hospital staff privileges.[1]

The important facts are as follows: Dr. Miller, a licensed physician and board-certified surgeon specializing in urology, was recruited by and granted staff privileges at Indiana Hospital in 1958. Indiana Hospital is the only general Hospital in Indiana County, a county encompassing an area of approximately 825 square miles, and it is centrally located within the county. Miller's practice flourished, and over the course of the next 19 years he served the Hospital in various capacities, including vice-president of the medical staff and chairman of several key medical staff committees.[2]

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[1] The Complaint and amendments thereto raised claims under the federal Constitution, civil rights statutes, federal antitrust laws and state antitrust laws. The district court (Judge Mansmann) dismissed all of Miller's claims except those under the antitrust laws. *Miller v. Indiana Hospital*, 562 F. Supp. 1259 (W.D. Pa. 1983).

[2] Miller also instructed the medical staff in cardiopulmonary resuscitation methods and taught physiology and anatomy to nursing students. Within his specialty, he invented an innovative surgical instrument and contributed to the scientific literature.

In the early 1970's, Miller's plans for a new concept in the delivery of health care services in Indiana County began to take shape. The concept involved a group physician practice designed to attract families by providing pediatric services, as well as the services of general practitioners and medical and surgical specialists. In addition, traditional Hospital-based services such as laboratory and radiology would be offered without the overhead expenses incurred by hospitals, resulting in lower costs to the patients. The facility would, therefore, be in direct competition with the Hospital, particularly as to outpatient services, as well as with individual physicians through its recruitment of new physicians to the area. Miller's plans materialized as the Indiana Medical Center, for which in 1975 he had a building erected a short distance from the Hospital. A51-52.

The testimony of various witnesses, including former financial officers of the Hospital, indicates that Miller's plans were perceived by the Hospital as a direct economic threat. A58-61. Miller alleges that the Respondents took specific steps to nip this threat in the bud, including the discontinuance of patient referrals, the refusal to provide on-call coverage for the pediatricians Miller employed at Indiana Medical Center, and ultimately, the revocation of Miller's hospital staff privileges. Indeed, the Third Circuit has already concluded that sufficient evidence has been presented to enable the factfinder to determine that the Respondents'

actions were undertaken for anticompetitive purposes. *Miller v. Indiana Hospital*, 843 F.2d 139, 144-45 (3d Cir. 1988), *cert. denied*, 488 U.S. 870 (1988).[3] A43-45.

Miller submits that the most egregious of the Respondents' predatory conduct revolved around a scheme to revoke his hospital staff privileges. On February 16, 1977, an 81-year-old patient died after being admitted to the Hospital by Miller. The following day, Respondent Williams, who had supervised an unsuccessful attempt to resuscitate the patient, sent a report to the president of the medical staff, Respondent

[3] Miller has also raised charges of other outrageous conduct indicative of a far-reaching effort by the Respondents to destroy Miller's ability to compete effectively as a respected physician in the community. The alleged conduct includes: efforts by the physician Respondents to influence the local court to rule in favor of a pediatrician whom Miller had sued for breach of contract for leaving Indiana Medical Center and attempting to enter into professional competition with the Center; attempts by Respondents Williams, Weiner and Smith to destroy Miller's personal and professional credibility by asserting publicly that Miller was psychologically unstable; an attempt by Respondent Goldstrohm to tarnish Miller's reputation by stating publicly that Miller was physically abusive to his family; an attempt by Respondent Hild to interfere with Miller's friendship with another administrator of the Hospital; an attempt by Respondent Goldstrohm to employ his personal acquaintance with the local court judge to influence the result in Miller's injunction proceedings against the Hospital; the Hospital administration's interception and retention of mail addressed to Miller and a local citizen's committee of which he was a prominent member; attempts by Respondent Williams to discourage Pittsburgh-based internists from associating with Miller and his Center; the publication in the local newspaper of letters by Respondents Hild and Goldstrohm impugning Miller's claims and, by innuendo, his character; an attempt by Respondent Weiner to extend disciplinary proceedings against Miller to the County Medical Society, of which Weiner was then the president, via bylaw amendments which would apply only to Miller; the filing of a meritless and voluntarily discontinued defamation suit by the Respondents against Miller; and, the retention by the Respondents of a law firm whose partners included the spouse of the federal district court judge who was handling this case at the time.

Freda, claiming that the care provided by Miller was substandard.[4] One week later, Williams followed up on his report with a backdated letter to the medical staff's executive committee requesting that Miller's staff privileges be suspended or revoked. The executive committee, then consisting of Respondents Williams, Goldstrohm, Hughes, Hanna, William Evans, Waldo and Freda, and a Dr. Garrettson, held an informal meeting, attended by Miller, during which the committee leveled no specific charges but decided to recommend to the Hospital's board of directors that Miller's staff privileges be revoked. Discovering that it was in violation of the medical staff bylaws to issue such a recommendation without having first been presented with a written request for revocation, the executive committee convened a second meeting at which it refused Miller's request for the appointment of an impartial *ad hoc* committee and again recommended revocation.

As was his right under the bylaws, Miller demanded a hearing on the executive committee's recommendation. Consequently, the committee notified Miller in writing of the hearing date, the charges against him—which went well beyond those raised in Williams' original complaint

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[4] Curiously, in a subsequent state court proceeding by Miller for an injunction to prevent the revocation of his staff privileges, the Hospital's attorney made the following representation in open court: "One of the things I think that I ought to point out at the outset of this proceeding and this summation what is not—this, for example, is not a contest or fight or attack on Dr. Miller's right to practice medicine. Indeed, it is not in any way an attack on his competency, his capability to practice in a highly specialized field of medicine, urology. Indeed, I don't think anyone who has known Dr. Miller for even a short period of time would question one or two facts: One, that he is intelligent, indeed, brilliant; and Two, that he is capable, capable of practicing the finest type of and standard of urological medicine in the country." In the Court of Common Pleas of Indiana County, Pennsylvania, No. 35 E.Q. 1977.

letter—and the names of the witnesses who were to appear. The hearing committee was comprised of three members of the Hospital's medical staff and one member of the dental staff; the Hospital's legal counsel presided. The hearing began on June 15, 1977, consumed several days, and resulted in the hearing committee's report of August 3, 1977, recommending that Miller's staff privileges be revoked. Specifically, the committee found that Miller had exhibited disruptive, insulting, intimidating, disrespectful, disparaging, abusive and other improper behavior toward various members of the staff; that he had acted improperly in the case of the deceased patient by failing to request a medical consultation, by failing to order certain tests, and by making improper entries in the patient's record; that he had failed to comply with an order of the Bureau of Medical Assistance barring him from writing Medical Assistance prescriptions that he had acted unprofessionally by discussing confidential medical information with a layperson; and, that he had failed to carry out certain administrative duties.

Miller alleges that the hearing was a sham, characterized by multiple procedural and substantive irregularities designed to ensure a revocation recommendation. These well-calculated irregularities allegedly included the following:

- The appointment of hospital counsel as the hearing officer in charge of determining procedure and ruling on evidentiary issues. Miller's challenge to this appointment was denied.
- The appointment of hearing committee members whom Miller challenged on the basis of personal and professional bias. This challenge was also denied.

- The formulation during informal, unrecorded meetings, of additional charges against Miller without an investigation of their accuracy.
- The falsification of nurses' notes to support the charges against Miller.
- An attempt by the Hospital administrator and Williams to persuade a witness to give suborned testimony against Miller.
- An assumption of guilt and the requirement that Miller present his witnesses and defense before the presentation of the Hospital's case against him.
- The allowance by the hearing officer of unsupported hearsay testimony against Miller.
- The failure of Miller's accuser, Williams, who allegedly mismanaged and admittedly stood by during the failed resuscitation attempt on Miller's patient, to appear and subject himself to cross-examination.
- The reliance of the hearing committee, in concluding that Miller had provided inadequate treatment, on the testimony of the only expert witness presented against Miller where that witness's opinion was contradicted by seven physicians who testified in Miller's favor and where, moreover, that witness perjured himself in failing to disclose, though questioned, that the Hospital's lawyer was representing him in a divorce proceeding. (The Hospital's lawyer failed to disclose his witness's deception.)

A53; Appendix to Third Circuit at No. 92-3147, pp. 496-502.

The executive committee adopted the hearing committee's recommendation, and Miller appealed to the Hospital's board of directors. After an adversary hearing, a committee of four directors affirmed the determination of the executive committee, and the full board adopted their recommendation on October 7, 1977. At that time, per the bylaws, Miller's staff privileges were revoked.[5]

Miller then filed an action against the Hospital in the Court of Common Pleas of Indiana County to prevent the removal of his staff privileges, and the court granted him a preliminary injunction on October 14, 1977. On February 9, 1978, after the president judge, who was a friend of Respondent Goldstrohm, had taken over the case, the court dissolved the temporary injunction, and later it refused Miller's request for a permanent injunction. Miller appealed this decision to the Superior Court of Pennsylvania, which affirmed the lower court. *Miller v. Indiana Hospital*, 419 A.2d 1191 (Pa. Super. 1980).

Miller continued to apply for staff privileges for several years after 1977; however, the Hospital refused to process those applications and subsequently refused to even provide him with an application form. Therefore, in 1980 Miller filed a petition with the Commonwealth of Pennsylvania Department of Health requesting a hearing and contending that the Hospital's refusal to furnish him with an application for staff privileges and to process his

[5] The Third Circuit has already recognized in this case that "the absence of staff privileges is devastating to a physician, especially to a specialist such as a surgeon, who depends to such a large degree on the technology and equipment found only in a hospital setting, and puts the physician at 'a competitive disadvantage, if for no other reason than it connotes second-class practitioner.' " *Miller v. Indiana Hospital*, 843 F.2d at 141, n. 2. (Citations omitted.) A37.

applications violated state and federal regulations as well as hospital bylaws. After receiving an *ex parte* response from the Hospital's lawyer, the Department of Health refused Miller's request for a hearing and advised him that neither the regulations nor the bylaws required the Hospital to provide him with an application.

Miller filed the present suit on July 2, 1981. The Respondents filed the first of their three motions for summary judgment in 1985, asserting numerous defenses, including immunity under the *Parker* state action doctrine. Two years later, the district court (Judge Simmons) finally acted, granting the motion but failing to address the immunity argument. *Miller v. Indiana Hospital*, 660 F. Supp. 250 (W.D. Pa. 1987). The Third Circuit reversed and remanded, declining, however, to decide the immunity issue. *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988), *cert. denied*, 488 U.S. 870 (1988). A.33. The Respondents then filed a renewed motion for summary judgment again raising state action immunity; this time the district court (Judge Bloch) granted the motion on that basis. Following Miller's appeal, the Third Circuit once again reversed and remanded the case to the district court. *Miller v. Indiana Hospital*, 930 F.2d 334 (3d Cir. 1991).

Following remand, the district court ordered discovery to close on November 22, 1991, Miller's pretrial statement to be filed by December 18, 1991, and a pretrial conference to be held on January 24, 1992.

On December 11, 1991, the Respondents filed their third and final motion for summary judgment, the primary thrust of which was that Miller had allegedly failed to introduce evidence that the Respondents had the market power necessary to harm competition in the relevant geographic and product markets. Miller filed his

pretrial statement on December 18, 1991, identifying Ronald Gots, M.D., Ph.D., as an expert witness and attaching thereto a copy of Gots' report dated December 12, 1991. In his report, Gots stated that the Hospital possessed monopoly power in the Indiana County area.

On February 7, 1992, Miller filed his Motion for Leave of Court to File Supplemental Pretrial Statement. The grounds for the motion were clearly set forth therein as follows. App. 585. On December 16, 1991, two days before the due date for Miller's pretrial statement and expert reports, Miller's counsel telephoned Gots and was informed that, contrary to his previous representations, Gots would not testify at trial on the market share issues. Miller's counsel immediately attempted to obtain another expert, and, on January 22, 1992, received a report from Steven Klepper, Ph.D. Shortly thereafter, Miller filed his motion proffering Klepper as an expert witness. By Order dated February 19, 1992, the district court denied the motion and also ruled, *sua sponte* and without argument or hearing, that Gots was unqualified to testify on the market issues. A31.

Having rejected Miller's market share experts, the district court entered a Judgment Order on March 9, 1992, granting the Respondents' motion for summary judgment. In dismissing Miller's Section 1 claim, the district court concluded that Miller had failed to introduce evidence of market power or substantial harm to competition. The district court dismissed the Section 2 monopolization claim on the basis that Miller had failed to present evidence of the relevant geographic market or the Respondents' ability to exert market dominance in that market. The district court ignored Miller's attempt to monopolize claim. A3.

Concluding that the district court "did not abuse its discretion in ruling on the Gots and Klepper proffered testimony, and for the reasons set forth by the district court in its opinion," the Third Circuit affirmed the entry of summary judgment in its Judgment Order dated August 11, 1992. A1. Miller filed a timely petition for rehearing which the Third Circuit denied on September 16, 1992. A47. This Petition now follows.

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit ignored the law of this Court which dispenses with the need to show market power in a Section 1 claim where there is proof of actual injury to competition.

The federal antitrust laws were enacted for the protection of competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Therefore, the central focus of antitrust analysis is whether the conduct complained of could cause injury to competition. *See Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328 (1990); *Business Electronics Corp. v. Sharp Electronics*, 485 U.S. 717 (1988); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The extent to which particular conduct alleged to violate Section 1 causes or threatens injury to competition is usually determined under the rule of reason. *Business Electronics Corp.*, 485 U.S. at 723. Under the rule of reason, a plaintiff ordinarily must define the relevant geographic and product markets and show that the defendant possessed sufficient power to eliminate or impair competition in those markets. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). Injury to competition may then be *inferred* from the defendant's market power (its *ability* to injure competition)[6] plus its anticompetitive conduct. *See, e.g., Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1353 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

[6] Market power has been defined by this Court as the ability to control price or restrict competition. *United States v. Grinnel Corp.*, 385 U.S. 563, 571 (1956).

Market definition and a full market analysis, however, are not always required in order to prove a Section 1 violation. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), this Court held that since market power is merely a surrogate for direct evidence of injury to competition, where the plaintiff shows injury to competition, there is no need for the complex process of market definition and analysis.

In *Indiana Federation*, a group of dentists agreed not to provide x-rays demanded by health insurers, thereby preventing the insurers from monitoring the cost of care. This Court held that while the agreement was not conduct previously classified as *per se* unlawful, a detailed market analysis was not necessary to support the Federal Trade Commission's finding of a Section 1 violation:

> "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and such a restriction "requires some competitive justification even in the absence of a detailed market analysis." Moreover, even if the restriction imposed by the Federation is not sufficiently "naked" to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. The Commission found that in two localities in the State of Indiana (the Anderson and Lafayette areas), Federation dentists constituted heavy majorities of the practicing dentists and that as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x-rays. *Since the purpose of their inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual*

> *detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."* 7 P. Areeda, Antitrust Law ¶1511, p. 429 (1986).

Indiana Federation of Dentists, 476 U.S. at 460-61. (Citations omitted.) (Emphasis added.)[7]

In the present case, Miller presented ample evidence that the Respondents' actions not only threatened competition but, indeed, curtailed it dramatically. Most obviously, the revocation of Miller's hospital staff privileges denied him access to the facilities of the Hospital, thereby preventing him from providing in-hospital urological services and, for more than a year, reducing to one the number of urologists with privileges at the Hospital. As a result, consumer choice for patients in need of in-hospital urological services was completely eliminated. A54-55. Additionally, evidence was submitted showing that Miller's Indiana Medical Center offered or was designed to offer multi-specialty outpatient services and facilities not found elsewhere within Indiana County, except at the Hospital. A52, 67, 73. Miller testified that the Respondents' conduct, particularly in revoking his staff privileges, refusing to refer patients to him, and refusing to provide on-call coverage to any pediatrician

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[7] *See also National Collegiate Athletic Assoc. v. Board of Regents*, 468 U.S. 85, 109-110 (1984); *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) ("If the plaintiff can make a showing of anticompetitive effects, a formal market analysis becomes unnecessary."); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) ("Of course, a detailed inquiry into a firm's market power is not essential when the anticompetitive effects of its practices are obvious."); *Reazin v. Blue Cross and Blue Shield, Inc.*, 899 F.2d 951, 966-968 (10th Cir.), *cert. denied*, 110 S. Ct. 3241 (1991) ("While market share is convincing evidence of monopoly power, so is actual price control and exclusion of competitors.").

associated with Indiana Medical Center, scuttled the Center by rendering it impossible for Miller to attract and retain physicians to staff the Center. A53-54. Miller also testified that Indiana Medical Center was able to offer its services at a lower price than those offered at the Hospital; thus, the elimination of the Center as a competitor resulted in supracompetitive prices. A52.

In the face of this clear evidence of actual injury to competition, the lower courts' conclusion that Miller could not prove a Section 1 violation due to an alleged absence of evidence of market power is inconsistent with the law of this Court. Accordingly, a writ of certiorari should issue so that this Court may correct the lower courts' erroneous interpretation and application of the antitrust laws.

II.

The Third Circuit ignored the Ninth Circuit's *Lessig* rule, presently being reviewed by this Court, which permits an inference of dangerous probability of success based upon proof of predatory conduct or actual injury to competition.

The district court also dismissed Miller's Section 2 claims, finding that his failure to establish the Respondents' market power rendered it impossible for Miller to prove that the Respondents possessed a monopoly. A28-29. The district court failed to address Miller's attempt to monopolize claim; however, presumably the court would also have explicitly dismissed that claim based on the same alleged evidentiary shortcoming.

On appeal to the Third Circuit, Miller asserted the viability and applicability of the Ninth Circuit's so-called *Lessig* rule, arguing that under that rule the evidence of predatory conduct and anticompetitive motive made summary judgment inappropriate as to the attempt to monopolize claim. In affirming the district court's decision, the Third Circuit failed to address this argument.

The elements necessary to prove an attempt to monopolize claim under Section 2 are:

1. Predatory or anticompetitive conduct;
2. Specific intent to monopolize; and
3. Dangerous probability of success.

Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); *United States v. Griffith*, 334 U.S. 100, 105-106 (1948).

The *Lessig* rule originated in the case of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964). Since then, the *Lessig* rule has evolved into its present form in which dangerous probability of success may be inferred from evidence of (1) market power and anticompetitive conduct (as recognized in every circuit); or (2) conduct that is predatory or clearly in restraint of competition (as recognized by the Ninth Circuit). The dangerous probability element may also be proved directly by showing ongoing injury to competition, *i.e.*, effect on price or exclusion of competitors. *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373, 1378 (9th Cir. 1989); *United States v. Syufy Enterprises*, 903 F.2d 659, 664-671 (9th Cir. 1990). In other words, the *Lessig* rule provides an alternative means, other than a full-scale market analysis, to establish dangerous probability of success.[8]

The validity of the *Lessig* rule is presently under consideration by this Court in *Spectrum Sports, Inc. v. McQuillan*, No. 91-10 (U.S. Oct. Term 1990). Should this Court uphold the validity of the *Lessig* rule, the entry of summary judgment on Miller's Section 2 attempt to monopolize claim would be inappropriate in light of the judicially-acknowledged evidence of anticompetitive motive and predatory conduct. *See Miller v. Indiana Hospital*, 843 F.2d at 144-45. Therefore, a writ of certiorari should issue in order that the courts below may address the sufficiency of Miller's evidence under the *Lessig* rule.

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[8] In addition, the *Lessig* rule permits a finding of specific intent to monopolize based on evidence of predatory or anticompetitive conduct. To that extent, however, the rule unquestionably conforms with the law of this Court which provides that, since direct evidence of specific intent is rarely available, such intent may be inferred from the defendant's anticompetitive conduct. *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953).

III.

In the absence of prejudice and willful or bad faith conduct, the district court committed a gross abuse of discretion in refusing to consider the expert market share testimony proffered by Petitioner.

Miller respectfully requests the issuance of a writ of certiorari so that this Court may correct a clear subversion of justice, to wit, the third entry of summary judgment, in an eleven-year-old case, which resulted from the district court's refusal to consider expert testimony proffered by Miller beyond the court's designated due date where the tardiness in offering the testimony was not Miller's fault and would have caused no prejudice to the Respondents, and where less severe alternative sanctions were available. Under the facts of record, the district court's decision amounts to an unconscionable abuse of discretion with its exaltation of paper filing procedures over fairness and justice. The egregious nature of the district court's decision is glaring in light of the fact that Miller himself had to endure greatly protracted litigation due to delays caused by the district court in taking two years to rule on the Respondents' first motion for summary judgment and in twice wrongly granting summary judgment, thus necessitating time-consuming and expensive appeals by Miller, only to have his case effectively dismissed for a minor delay in proffering expert testimony.

Miller's pretrial statement listed Ronald Gots, M.D., Ph.D., as an expert witness, and a copy of Gots' report dated December 12, 1991 was appended thereto. His report addresses two aspects of this antitrust case: (1) the issue of whether the revocation of Miller's staff privileges was based upon criteria generally required and customarily utilized in such matters, and (2) the market

share issues. In its Memorandum Opinion supporting entry of summary judgment, however, the district court ruled that Gots is not qualified to testify as to either the product or geographic markets. A31. The district court gave no notice of its intention to consider the issue of Gots' qualifications, entertained neither oral argument nor an *in limine* hearing, and even failed to offer any explanation or indication why it found Gots to be unqualified.

Fed. R. Evid. 702 provides that where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The qualification of expert witnesses is generally left to the discretion of the trial court, and the appellate court reviews such rulings to determine only whether or not they are clearly erroneous. *U.S. v. 68.94 Acres of Land in Kent County*, 918 F.2d 389, 392 (3d Cir. 1990). Nevertheless, Rule 702 is to be interpreted liberally. *See In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 855-6 (3d Cir. 1990) (district court abused its discretion in excluding testimony simply because experts did not have the degree or training the court considered most appropriate). This directive is in harmony with Fed. R. Evid. 102 which states that the rules of evidence shall be construed to secure the fair and just determination of proceedings.

A review of Gots' report reveals that he not only is a physician, but that he also indeed possesses special knowledge and experience in health care economics, which would reasonably encompass market and competition issues. He states:

> I have directed a company which under contract ran emergency departments for hospitals and occupational medicine clinics for the Federal Government. . . . For the past ten years I have been engaged actively in my organizations in review of the administrative aspects of medical care including, in some detail, reimbursement of health care issues and the economics of health care. I have published numerous articles in various health care and health care economics publications.

App. 503.

The district court here abused its discretion in ruling, without any further inquiry into Gots' expertise, that Gots is not qualified to offer testimony on either the product or geographic market aspects of this case. Therefore, the statements and opinions set forth in Gots' report should have been considered in determining the appropriateness of summary judgment. Moreover, as shown below, the court compounded its error by using the disqualification of Gots as a basis for precluding Klepper's testimony.

In denying Miller's request to substitute Klepper for Gots, the district court stated that:

> [I]t is clear from the report of Dr. Gots that, unlike Dr. Klepper, he is not an expert in the field of market share and plaintiff cannot plausibly argue that he expected Dr. Gots to so testify. In light of the fact that the case is on the eve of trial, this Court finds that defendants will suffer extreme prejudice if plaintiff is permitted to introduce testimony which was not previously identified by any expert.

A32.

As is evident from the district court's subsequent Memorandum Opinion, the exclusion of Gots' and Klepper's proffered testimony led directly and inevitably to the entry of summary judgment. Accordingly, the district court and Third Circuit were obliged by the law of the circuit to consider the propriety of this extreme sanction under the guidelines set forth in *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984). *See Ali v. Sims*, 788 F.2d 954, 957 (3d Cir. 1986).

The review appropriate in the present case was set forth as follows:

> In exercising our appellate function to determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default, we will be guided by the manner in which the trial court balanced the following factors, which have been enumerated in the earlier cases, and whether the record supports its findings:
>
> (1) The extent of the *party's* personal *responsibility*; (2) The *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) A *history* of dilatoriness; (4) Whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) The effectiveness of sanctions and other than dismissal, which entails an analysis of *alternative sanctions*, and (6) The *meritoriousness* of the claim or defense.

Poulis, 747 F.2d at 868.

The issue before this Court, of course, is not whether pretrial orders should be enforced but whether enforcement requires a sanction that distorts the truthseeking process by excluding material evidence. The Third Circuit has itself recognized the importance of this distinction:

> We recognize that recent literature exhorting the district judges to move litigation expeditiously by taking firm control of the 1983 amendments of the Federal Rules of Civil Procedure with their numerous references to sanctions may have contributed to premature dismissals or defaults. Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dismissal as a necessary "weapon" in the trial court's "arsenal" may be contributing to or effecting an atmosphere in which the meritorious claims or defenses of innocent parties are no longer the central issue. . . .
>
> We reiterate what we have said on numerous occasions: that dismissals with prejudice or defaults are drastic sanctions, termed "extreme" by the Supreme Court, *National Hockey League*, 427 U.S. at 643, 96 S. Ct. at 2781, and are to be reserved for comparable cases.

Poulis, 747 F.2d at 867-68.

The Third Circuit has also indicated that the requirement of a full *Poulis* analysis may not be dispensed with at the discretion of the district court. *See Scarborough v. Eubanks*, 747 F.2d 871, 874-75 (3d Cir. 1974) ("In *Poulis* . . . we recapitulated the appropriate factors that the trial court must consider before dismissing a complaint or entering a judgment of default as a sanction."). Here, the district court neglected to weigh most of the factors set forth in *Poulis* and, for those factors which it did not purport to consider, its findings were conclusory and clearly erroneous.

First, there was no suggestion that Miller was personally responsible for the late offer of Klepper's testimony. Second, the tardiness in proffering the testimony was not the result of any willful or bad faith

conduct on the part of Miller's counsel; rather, it was entirely excusable under the circumstances. Accordingly, for this reason alone, the district court's decision was improper. In a case involving a district court's application of Fed. R. Civ. P. 37, which authorizes sanctions for a party's failure to make or cooperate in discovery, this Court held that the rule:

> . . . should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958).[9]

Most importantly, although the district court stated that Respondents would be prejudiced by the acceptance of the proffered testimony, saying it simply does not make it so. In point of fact, the Respondents would have suffered no prejudice for the following reasons:

> (a) Respondents' counsel was advised of Miller's position on the market share issues as early as 1985 (App. 170-175);
>
> (b) The Respondents received a report of their own expert even before Miller's expert report was due;
>
> (c) Klepper's report relied upon the very same data utilized by the Respondents' expert and simply drew different conclusions from that data as to the relevant markets. Accordingly, Klepper's testimony would have injected neither new facts nor new theories into the case. Indeed, his opinions were already substantively addressed in the Respondents' expert report. App. 555, 593.

[9] While the case presently before this Court does not involve a sanction under Rule 37, the principles embodied in that rule also apply to failures to satisfy pretrial orders such as is involved here.

Finally, the district court failed to consider the effectiveness of alternative sanctions. As the Third Circuit so wisely noted in *Poulis*, "dismissal must be a sanction of last, not first, resort." 747 F.2d at 869. In this vein, Miller submits that, even assuming some type of sanction was proper, a more appropriate remedy would have been to permit the Respondents to file a supplemental expert's report with the cost to be borne by Miller. As the Third Circuit itself recognized, "alternatives are particularly appropriate when the plaintiff has not personally contributed to the delinquency." *Poulis*, 747 F.2d at 866.

Therefore, a writ of certiorari should be issued so that this Court may correct the injustice inflicted upon Miller by the district court's abuse of discretion.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the Judgment Order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

Judgment Order of the United States Court of Appeals for the Third Circuit (August 11, 1992)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3147

RALPH J. MILLER, M.D.,

Appellant,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HEALTH; H. ARNOLD MULLER, M.D.

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 0315-2 : 81-01091)
District Judge: The Honorable Alan N. Bloch

Submitted Under Third Circuit Rule 12(6)
Friday, August 7, 1992

Before: GREENBERG, ALITO and ALDISERT,
Circuit Judges.

JUDGMENT ORDER

After considering all the contentions of the appellant, to-wit: that the district court abused its discretion in ruling that Ronald Gots, M.D., Ph.D., is not qualified to offer expert testimony on market shares issues and in denying plaintiff's request to introduce the expert testimony of Stephen Klepper, Ph.D.; that the evidence was sufficient to establish market power in the relevant product and geographic markets; that the evidence is sufficient to establish significant harm to competition; and that plaintiff's claim for injunctive relief does not require a showing of actual harm,

and concluding that the district court did not abuse its discretion in ruling on the Gots and Klepper proffered testimony, and for the reasons set forth by the district court in its opinion filed March 9, 1992, App. at 715A, rejecting the antitrust and injunction claims, it is

ADJUDGED AND ORDERED that the judgment of the district be and is hereby AFFIRMED.

Costs taxed against the appellant.

BY THE COURT,

RUGGERO J. ALDISERT
Circuit Judge

Attest:

SALLY MRVOS
Sally Mrvos, Clerk

DATED: AUG 11 1992

APPENDIX B

Memorandum Opinion and Judgment Order of the United States District Court for the Western District of Pennsylvania (March 9, 1992)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 81-1091

RALPH J. MILLER,

Plaintiff,

vs.

INDIANA HOSPITAL, *et al.*,

Defendants.

MEMORANDUM OPINION

BLOCH, District J.

Before this Court is defendants' motion for summary judgment. For the reasons stated herein, the Court finds that the record, taken as a whole, demonstrates that a rational trier of fact would not find for plaintiff, *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and, therefore, there is no genuine issue for trial. Defendants' motion will be granted.

I. Facts

This suit arises out of the revocation of plaintiff's medical staff privileges by defendant Indiana Hospital (Hospital) in 1977, and out of the Hospital's refusal to accept and process plaintiff's post-termination applications for reinstatement. The undisputed facts of this case are as follows. Plaintiff is a licensed physician specializing in urology, and obtained staff privileges at the Hospital in 1958. Indiana Hospital is the only general hospital in Indiana County, a county encompassing an area of approximately 825 square miles, and is centrally located within the county.

In the early 1960's, plaintiff purchased a tract of land in the vicinity of the Hospital. In 1964, he built a professional office building with a 5-physician capacity on the tract, and his own practice was moved into this facility. Also in the 1960's, plaintiff began plans for a new concept in Indiana County involving delivery of health services. The concept involved a group physician practice that would attract families by providing pediatric services as well as the services of general practitioners and medical and surgical specialists. This concept materialized as the Indiana Medical Center (IMC), for which plaintiff had a building erected in 1975. Prior to the building completion, plaintiff began recruiting physicians to staff the center, and employed two pediatricians at IMC as well as three consulting internists who practiced in Pittsburgh and made regular visits to IMC.

On February 16, 1977, Joseph P. White, a patient who had been under the care of plaintiff, died at the Hospital. The following day, defendant Dr. Melvin Williams, a member of the Medical Staff's Executive Committee, sent a report to defendant Dr. Richard Freda, the

President of the Medical Staff, stating that the quality of care which plaintiff had rendered to White was below that which should be acceptable in any hospital. On February 22, 1977, Dr. Freda sent a letter to plaintiff inviting him to attend a meeting of the Executive Committee pursuant to the Hospital Staff Bylaws regarding the charges which had been made against him. On February 24, 1977, Dr. Williams sent another letter to the Executive Committee formally requesting that action be taken to suspend plaintiff's staff privileges. This letter cited additional instances of inadequate care provided by plaintiff. On February 26, 1977, the Executive Committee held an informal meeting which plaintiff attended. Plaintiff refused to discuss the charges against him and left the meeting abruptly.

On March 18, 1977, the Executive Committee sent written notice to plaintiff of its determination to recommend to the Board of Directors of the Hospital that his active staff privileges be revoked. Plaintiff demanded a hearing and indicated his intention to exercise his rights to defend himself in accordance with the Bylaws. Consequently, the Committee informed plaintiff of the hearing date and provided him with a list of charges against him and a list of proposed witnesses. The list of charges went beyond those included in the original complaint letter and request for revocation. In the interim, plaintiff requested that the Executive Committee appoint an impartial ad hoc committee to conduct the hearing because he viewed the Executive Committee as hostile and biased against him. The Committee denied the request and held a hearing beginning on June 15, 1977, and continuing for several days thereafter.

The hearing committee consisted of three members of the Medical Staff and one member of the Dental Staff. Both parties were represented by counsel. The hearing officer presiding over the proceedings was counsel to the Hospital. The hearing committee recommended the revocation of plaintiff's staff privileges finding that plaintiff had engaged in disruptive, insulting, disparaging, disrespectful, abusive and other improper behavior towards physicians, nurses and administrative personnel and delineated numerous examples of such behavior. The Committee also found that plaintiff acted improperly in failing to request a medical consultation concerning White "under circumstances which should have clearly indicated to Dr. Miller the need for such consultation." (Hearing Committee Finding No. 2).

The committee also found that plaintiff had "failed to order, or to timely order, various standard, routine and necessary examinations, testings and laboratory work incidental and necessary for proper medical management of patient Joseph P. White's respiratory condition." (Hearing Committee Finding No. 3). In addition, the committee found that plaintiff had failed to comply with an order of the Bureau of Medical Assistance, barring him from further participation of writing of prescriptions under the Commonwealth Medical Assistance Program and that at various times plaintiff had violate Medical Assistance Rules and Regulations and Pennsylvania law by privately billing Medical Assistance patients, referred to him on a rotation basis by the Hospital. (Hearing Committee Finding Nos. 4, 11). The plaintiff was also found to have "made an improper and unprofessional comment and publication, by conducting a discussion with a layman, at which time Dr. Miller revealed confidential medical information about a certain patient's

pap smear." (Hearing Committee Finding No. 6). Finally, plaintiff was found to have exhibited a lack of diligence in his duties as Chairman of the Infection Control Committee in 1976; a failure to cooperate with the Executive Committee of the Medical Staff concerning its Preceptorship Program in the year 1971; a failure to cooperate with the Executive Committee by refusing to serve on a Library Committee for the year 1975; and a failure to cooperate with the Hospital's administration by not preparing and submitting complete and adequate patient care records. (Hearing Committee Finding Nos. 7-10).

On August 10, 1977, the Executive Committee adopted the recommendation by the hearing committee that all Hospital staff privileges and the staff membership of plaintiff be revoked. Plaintiff appealed to the Hospital Board of Directors. After an adversary hearing, a committee of four directors affirmed the determination of the Executive Committee and the full Board adopted their recommendation.

On October 14, 1977, plaintiff obtained a preliminary injunction *ex parte* from the Court of Common Pleas of Indiana County preventing revocation of his staff privileges. The Court dissolved the preliminary injunction on February 9, 1978, and denied a permanent injunction on June 29, 1978. The Court reviewed each of plaintiff's allegations and concluded that (1) the Hospital's revocation decision was in compliance with the Bylaws of the Hospital and the medical staff; (2) the Hospital's conduct was not arbitrary, capricious or contrary to law; and (3) the Hospital's decision was based on proper cause. *Miller v. Indiana Hospital,* No. 35EQ1977.

Plaintiff appealed the decision of the Court of Common Pleas to the Superior Court of Pennsylvania. On April 3, 1980, the Superior Court affirmed the lower court's finding that: (1) the charges against plaintiff were supported by sufficient evidence; (2) the Hospital adequately investigated the charges; and (3) the Hospital afforded plaintiff comprehensive procedural safeguards, including an appeal of right to the Board of Directors. *Miller v. Indiana Hospital*, 419 A.2d 1191 (Pa. Super. 1980).

During the pendency of the termination proceedings in 1977 and for several years following his termination, plaintiff applied for and was denied reinstatement of his staff privileges. Based on the 1977 revocation, the Hospital refused to consider his application and, in later years, refused to supply him with an application.

In 1980, plaintiff filed a petition with the Commonwealth of Pennsylvania Department of Health (DOH) contending that the Hospital's refusal to furnish him with an application for staff privileges and to process his application violated state and federal regulations and Hospital Bylaws. DOH treated the petition as a formal complaint under 1 Pa. Code §35.9 and instructed the Hospital to file a response. Thereafter, DOH advised plaintiff that "neither the Pennsylvania Department of Health regulations nor the bylaws of Indiana Hospital require that Indiana Hospital provide you with an application for medical staff privileges." After additional correspondence from plaintiff, DOH reaffirmed its decision and no further appeals were taken by plaintiff. *Miller v. Indiana Hospital*, 930 F.2d 334, 336 (3d Cir. 1991).

Plaintiff then filed a complaint in federal court on July 2, 1981, against the Hospital and certain administrators and physicians, raising federal civil rights, antitrust and pendent state claims. His civil rights and the pendent state claims were dismissed in *Miller v. Indiana Hospital*, 562 F. Supp. 1259 (W.D. Pa. 1983) (Mansmann, J.).[1] Only plaintiff's antitrust claims remain.

According to plaintiff, defendants effectively destroyed the IMC, eliminated his patient referrals and revoked his staff privileges, amounting to a willful abuse of monopolistic power to hamper competition. Plaintiff alleges that the revocation proceedings against him constituted unequal treatment by defendants as compared to the treatment of other staff physicians and that the disparity of treatment was motivated by the defendants' concerns that plaintiff's conduct and plans in the health care market posed an economic threat to the Hospital and individual physicians.

Defendants have moved for summary judgment in this case, stating that the pleadings, admissions of Dr. Miller, other evidence of record, and the affidavit of defendants' market expert establish the absence of a genuine issue of material fact on a number of the basic elements of Miller's claims under Sections 1 and 2 of the Sherman Act.

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[1] Procedural history since the 1983 decision includes a district court ruling granting summary judgment on the antitrust claims based on Hospital's motives, *Miller v. Indiana Hospital*, 660 F. Supp. 250 (W.D. Pa. 1987) (Simmons, J.), and subsequent reversal, *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988); and this Court's grant of summary judgment on immunity grounds, which was subsequently reversed. *Miller v. Indiana Hospital*, 930 F.2d 334 (3d Cir. 1991).

II. Summary judgment standard

Under recent United States Supreme Court decisions, "a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." *J. E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). In the Third Circuit, the standard has been articulated as follows:

> While the moving party has the burden initially of identifying that evidence that demonstrates the absence of a genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of every element necessary to its case and on which it bears the burden of proof.

Miller v. Indiana Hospital, 843 F.2d 139, 143 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988).

The courts have made it clear that the moving party does not need to put on evidence to negate his opponent's claim. Rather, he may simply point "out those lacunae in the nonmovant's evidence which the movant claims would prevent a jury from finding in the nonmovant's favor at trial." *J. E. Mamiye & Sons*, 813 F.2d at 618 (*citing Celotex*, 477 U.S. at 323). The purpose of Rule 56 of the Federal Rules of Civil Procedure is to allow the trial court to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita*, 475 U.S. at 587. Hence, if the record taken as a whole "renders [plaintiff's] claim implausible," the plaintiff "must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary." *Id.*

Although there have been presented issues of material fact as to defendants' intent in terminating plaintiff's staff privileges, *see Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988), in order to survive a motion for summary judgment, plaintiff must first satisfy certain legal prerequisites with respect to the relevant market and the effects of defendants' actions on competition.[2]

According to defendants, the basic flaw in plaintiff's Section 1 antitrust claim is the absence of proof of an antitrust injury; that is, proof that his termination from staff privileges actually harmed the public by reducing competition in any properly defined relevant market. As to the Section 2 claim, defendants argue that plaintiff has failed to establish monopoly power in the relevant geographic market.

III. Section 1 claim

Section 1 of the Sherman Act provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

15 U.S.C. §1 (1982). Under settled law, in order for a plaintiff to prevail on a Section 1 claim, four elements must be proven: "(1) that the defendants contracted, combined or conspired among each other; (2) that the

[2] Defendants have alleged that plaintiff has no standing to enforce the antitrust laws, since IMC was the only entity against whom the illegal restraint was allegedly directed. This Court disagrees. Plaintiff has made it clear that he alleges that the illegal restraint was directed to himself as a result of setting up IMC. Because plaintiff has alleged a direct economic injury traceable to defendants' actions that allegedly violated the antitrust laws, plaintiff has standing. *Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 168 (3d Cir. 1984) (*citing Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 152 (1970)).

combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the [plaintiff was] injured as a proximate result of that conspiracy." *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1489 (3d Cir. 1985) (*Tunis I*). *See also Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 117 (3d Cir. 1988); *Weiss v. York Hospital*, 745 F.2d 786, 812 (3d Cir. 1984). Although many actions restrain trade to one degree or another, whether an action violates Section 1 of the Sherman Act depends on whether the restraint is unreasonable. *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (2d Cir. 1979).

A. The rule of reason and market power

In evaluating defendants' actions in the context of termination of hospital staff privileges, the "rule of reason" applies.[3] *Weiss*, 745 F.2d at 820; *Brown v. Our*

[3] The rationale for use of the rule of reason under such circumstances has been aptly explained in *Brown v. Our Lady of Lourdes Medical Center*, 767 F. Supp. 618 (D.N.J. 1991), as follows:

> "[T]he use of a hospital's internal review procedures does not imply [an] anti-competitive state of mind. Review procedures are necessary to insure that hospital staff members are competent medical practitioners." *Goss v. Memorial Hosp. System*, 789 F.2d 353, 355 (5th Cir. 1986). A medical staff is permitted to exclude an individual doctor based on that doctor's lack of professional competence or unprofessional conduct. When such a reason is offered for the exclusionary conduct, the court must apply the "rule of reason" to evaluate plaintiff's antitrust claim. *Weiss*, 745 F.2d at 820. The court must utilize the rule of reason when considering conduct otherwise subject to *per se* condemnation under §1 of the Sherman Act due to the public service aspect of the medical profession. *Weiss*, 745 F.2d at 820-21 and cases cited therein.

Brown, 767 F. Supp. at 628. Plaintiff indicates that, for purposes of this motion, he assumes that the rule of reason applies.

Lady of Lourdes Medical Center, 767 F. Supp. 618, 628 (D.N.J. 1991). According to the rule of reason, plaintiff bears the burden of proving that any concerted action taking place caused an anti-trust injury by imposing an unreasonable restraint on trade; the defendants are not required to prove that the practices are reasonable. *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 709 (4th Cir. 1991); *Brown*, 767 F. Supp. at 629; *Doctors Steuer & Latham, P.A. v. Nat. Med. Enterprises, Inc.*, 672 F. Supp. 1489, 1503 (D.S.C. 1987), *aff'd.*, 846 F.2d 70 (4th Cir. 1988); ABA Antitrust Section, *Antitrust Law Developments* 15 (2d ed. 1984). Under the rule of reason:

> the true test of legality is whether the restraining imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors.

Weiss, 745 F.2d at 817, n. 52 (*quoting Board of Trade*, 246 U.S. at 238).

In order for plaintiff to meet his burden, he must prove what market he contends was restrained and that the defendants played enough of a significant role in the relevant market to impair competition significantly. *Oksanen*, 945 F.2d at 709; *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). "Market power means the ability to injure consumers by curtailing output and raising price." *Steuer & Latham*, 672 F. Supp. at 1504 (*quoting Fishman v. Estate of*

Wirtz, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting in part)). Without such market power, any restraint on trade created by the defendants' actions is unlikely to implicate Section 1. *Oksanen*, 945 F.2d at 709.

B. Defining the market

Market definition requires both a geographic and a product dimension. It is a "fundamental tenet of antitrust law that the relevant market definition must encompass the realities of competition." *Oksanen*, 945 F.2d at 709 (*citing United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966)). Proper market definition "must include examination of both the alternatives available to consumers of hospital services in [Indiana] County and the alternatives available to [doctors practicing in the relevant product market] seeking job opportunities at [Indiana Hospital]." *Steuer & Latham*, 672 F. Supp. at 1504.

1. The relevant product market

The relevant product market consists of those:

> commodities reasonably interchangeable by consumers for the same purposes. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062-63 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978). Factors to be considered include price, use and qualities. *du Pont de Nemours*, 351 U.S. at 404. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for the other like goods in that market. *Id.* at 380, 400.

Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) (*Tunis II*).

Defendants accept plaintiff's product market definition—"physician services involving the use of hospital facilities and hospital services." (*See* answers to interrogatories (Set II) at ¶1 and Miller depo. (Exhibit 15)). Plaintiff, however, also points out that within the primary product market, well-defined submarkets may exist, whose boundaries are determined by practical factors such as the product's particular characteristics and uses, unique production facilities and distinct customers and prices. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Eastern Dental Corp. v. Isaac Masel Co., Inc.*, 502 F. Supp. 1354, 1360 (E.D. Pa. 1980). Relying on this precedent, plaintiff states that a method of product or service distribution such as the provision of medical services in a small ambulatory care clinic like IMC also can be considered a relevant product market or submarket for antitrust purposes. Plaintiff submits that there is a well-defined market or submarket for the services offered by IMC which were reasonably interchangeable with and in obvious competition with certain of the Hospital's services, particularly laboratory, radiology and minor surgery.

Defendants argue that plaintiff's attempt to interject a submarket theory should be rejected for a number of reasons. First, until the instant motion, plaintiff has never asserted a submarket theory and should be precluded from doing so at this late date, 11 years after the filing of the complaint. Second, plaintiff has provided no evidence that would allow the Court to recognize such a submarket. Third, plaintiff has failed to present any evidence that any of the defendants had "market power" in this submarket, contending that most doctors' offices provide laboratory, radiology and minor surgery services.

Plaintiff has the burden of proving that laboratory, radiology and minor surgery services constitute the entire relevant market and that other services were not "reasonably interchangeable." *Tunis II*, 952 F.2d at 724. Putting aside the fact that plaintiff has asserted this theory at such a late date in the litigation of this case, the Court finds that plaintiff failed to produce sufficient evidence that the relevant submarket is laboratory, radiology and minor surgery services. *Steuer & Latham*, 672 F. Supp. at 1512, n. 25 (*citing Military Services Realty, Inc. v. Realty Consultants of Virginia*, 823 F.2d 829 (4th Cir. 1987) (stating requirement for expert testimony on such issues)).[4] Further, assuming that plaintiff submitted evidence that laboratory, radiology and minor surgery services is a relevant submarket, plaintiff has presented no evidence tending to show that defendants possessed market power within that submarket. Therefore, the Court finds that the relevant product market is physician services involving the use of hospital facilities and hospital services.

2. Relevant geographic market

According to plaintiff, the relevant geographic market is Indiana County or the central portion thereof which the Hospital refers to as its primary service area. Defendants do not accept plaintiff's definition of the relevant geographic market. According to defendants, the relevant geographic market, at a minimum, includes five counties, encompassing nine hospitals within 35 miles of Indiana Hospital. (Ellis affidavit at 4).

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[4] Plaintiff has submitted a statement by a Dr. Gots to the effect that laboratory, radiology and minor surgery services offered by IMC were competitors to those services offered by the Hospital. However, as noted *infra*, n. 5, Dr. Gots would not be qualified to so testify since this is not an area of expertise of Dr. Gots. *Id.*

As with the relevant product market, the plaintiff bears the burden of proving the relevant geographic market. *Tunis II*, 952 F.2d at 726 (*citing Pennsylvania Dental Ass'n. v. Medical Services Ass'n. of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)). The relevant geographic market has been defined as "that geographic area in which there is effective competition in the sale and distribution of particular products or services [in this case, physician services involving the use of hospital facilities and hospital services], and in which persons or entities actually do, or potentially may, compete in the conduct of their business operations." *Steuer & Latham*, 672 F. Supp. at 1510. The relevant geographic market in antitrust analysis is that section of the country where a firm can increase its price without attracting new sellers or without losing many customers to alternative suppliers outside that area. *See* Landis & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937 (1981).

> "The definition of a relevant geographic market varies from case to case depending on the type of product and the geographic characteristics of an area, but the relevant geographic market must identify the area of effective competition that the defendant encounters when it offers its product or services for sale." *Collins* [*v. Associated Pathologists, Ltd.*, 1987-1 Trade Cas. (CCH) ¶67,603,] 60,620 [C.D. Ill. Feb. 11, 1987), *citing Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)].

Steuer & Latham, 672 F. Supp. at 1510. It is the geographic area in which a purchaser can practically turn to other sellers for products or services, in the event that the defendant seeks to raise its prices or restrict output. *Brown*, 767 F. Supp. at 630 (*quoting* W. Holmes,

Antitrust Law Handbook (1991 ed.) at 295, *citing United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 359 (1963)). "Consequently, the relevant geographic market is not comprised of the region in which the seller attempts to sell its product, but rather it is comprised of the area where [its] customers would look to buy such a product." *Tunis II*, 952 F.2d at 726. The relevant geographic market must encompass those hospitals which are perceived as attractive alternatives to Indiana Hospital by physicians, third-party payors and "above all by patients, who 'vote with their feet' by leaving the county in large numbers when they require hospitalization." *Steuer & Latham*, 672 F. Supp. at 1514. The relevant geographic market does not include solely the plaintiff's preference for performing his services at the only hospital in the county.

Plaintiff himself testified in his deposition that he was aware of situations where physicians in Indiana, including himself, referred urological patients outside the County "with some frequency." (Miller depo. at 434-35). In addition, the plaintiff testified that the pediatricians on staff at IMC, who came to Indiana County from their practices in Pittsburgh, would typically admit a patient either to Childrens Hospital in Pittsburgh or to Indiana Hospital, depending on "whether the pediatricians felt that the facilities of Indiana Hospital or their talents were not satisfactory to care for a particular patient." *Id.* at 446-47. Plaintiff also testified that women would chose to leave Indiana County to have babies and people would undergo elective surgery outside Indiana County due to quality of care concerns, even though those services were also provided by Indiana Hospital. *Id.* at 466.

In addition, Melba Galonis, plaintiff's partner at IMC, testified that Indiana residents use Indiana Hospital in addition to hospitals in Armstrong County, Johnstown, Latrobe, Greensburg, and Pittsburgh based on "their preference." (Galonis depo. at 68-69). This testimony indicates to the Court that physicians and patients can, and do, choose from a variety of hospitals for procedures and are not limited to Indiana Hospital.

As stated by the Federal Trade Commission, the boundaries of a relevant geographic market in the context of a hospital industry depends on barriers to entry and the ability of consumers to switch to other hospitals:

> Because we are concerned only with an area in which competition could be harmed, the relevant geographic market must be broad enough that buyers would be unable to switch to alternative sellers in sufficient numbers to defeat an exercise of market power by firms in the area. . . . If an exercise of market power could be defeated by the entry of products produced in another area, both areas should be considered part of the same geographic market, since competition could not be harmed in the smaller area. . . . Looking at a "static" snapshot of a market is thus insufficient in itself. . . . Rather, evidence of current market behavior must be viewed in a "dynamic" framework that considers the possible competitive responses of firms outside the current market area to anti-competitive behavior of firms within.

In the Matter of Hospital Corporation of America, 106 FTC 361, 466 (1985), *aff'd., Hospital Corporation of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987). As held in *Steuer & Latham*, "the dynamic analysis described by the Commission is at the heart of antitrust analysis; it is

central to the concept of market definition. The dynamic analysis hinges on the adducing of evidence of elasticity of demand and barriers to entry. In the absence of such evidence, it is simply not possible to infer whether a service area constitutes a geographic market for antitrust purposes." *Steuer & Latham*, 672 F. Supp. at 1511.

Plaintiff's assertion that the relevant geograhic market is Indiana County, or the central portion thereof, is based on the following data supplied by the Indiana Hospital PA Certificate of Need Application Proposal for Computerized Tomographic Whole Body Scanner (December, 1982):

> Based upon admission data, Indiana Hospital's primary service area consists of 54,551 residents or 59% of Indiana County's population. The communities ... provided 75.3% of Indiana Hospital's discharges. ... [Outlying portions] of Indiana County accounts for 14.6% of Indiana Hospital's discharges. Other Pennsylvania counties and Out-of-State admissions account for the remaining 10.1%.
>
> * * *
>
> Indiana Hospital's Primary Service Area consists of ten (10) townships and/or boroughs within a five (5) mile radius to the West to a fifteen (15) mile radius on the Northeast from Indiana Borough. ...
>
> The Relevance Index and Relative Market Share Index are indices which may be used to evaluate Indiana Hospital's strategic position within the health care market.

Relevance Index:

$$\frac{\textit{Persons in Primary Service Area discharged from Indiana Hospital}}{\text{Total Indiana County Discharges}}$$

The Relevance Index assesses the relationship between Indiana Hospital's discharges within Indiana Hospital's Primary Service Area and all Indiana County discharges from all other hospitals. Indiana Hospital's Relevance Index is 55.2%.

Relative market share:

$$\frac{\textit{Number of patients in the Primary Service Area discharged from Indiana Hospital}}{\text{Number of patients in the Primary Service Area discharged from all Hospitals}}$$

Indiana Hospital's relative market share for its primary service area is 82.8%. 1,501 patients residing within Indiana Hospital's Primary Service Area sought care from hospitals other than Indiana Hospital.

Indiana Hospital's Relative Market Share for its Primary and Secondary service area is 66%. 4,441 Indiana County residents who sought acute care, sought services from hospitals other than Indiana County.

Outmigration for Indiana County, as a whole, is 34%. Outmigration for Indiana Hospital's primary service area is 17.2%.

(Certificate of Need, at 7-10). The data contained in the Certificate of Need and plaintiff's definition of relevant geographic market refers solely to the Hospital's service area. In *Steuer & Latham*, the Court found that a county is not the relevant geograhic market in a single hospital county merely based on the hospital's service area. "In

order to convert a 'service area' into a geographic market, it is necessary to offer evidence regarding elasticity of demand and barriers to entry. Absent such evidence, which plaintiffs have the burden of introducing, there is no basis for inferring that a service area constitutes a geographic market, or that the patient origin data pertinent to that service area constitute 'market share' information." *Steuer & Latham*, 672 F. Supp. at 1511. In order to allow a jury to make a finding as to the Hospital's percentage of *market share*, plaintiff must first provide the Court with expert testimony that the service area does, in fact, constitute an antitrust market. *Id.* at 1511-12, n. 25. Plaintiff has not presented the Court with any evidence which could lead a jury to determine whether the above-cited statistics constitute a market share.

Although plaintiff has presented no expert testimony to support his version of the relevant geographic market,[5] defendants have submitted the expert report of Edwin P. Ellis, Jr., CPA, who states that the relevant geographic market is five counties encompassing nine hospitals and that defendants' market share in this relevant market ranged from 10.6 percent to 11.3

[5] Plaintiff did submit a report by Dr. Ronald E. Gots, M.D., Ph.D., which plaintiff asserts was intended to give expert testimony on the relevant geographic market. In his report, Dr. Gots states that he had been specifically asked to determine in his best judgment whether plaintiff's loss of Hospital privileges was based upon criteria generally required and customarily utilized in revoking physician privileges, and to determine whether the documents provided and available suggest non-medical, economic motivations for the Hospital's adverse action taken against plaintiff. He does not comment on the relevant geographic market, nor would he be so qualified. Thus, this report does not raise a genuine issue of material fact. Although plaintiff attempted to introduce the expert report of Dr. Klepper on the relevant geographic market, this Court, per Order dated February 19, 1992, ruled that such evidence would not be accepted.

percent. According to a 1977 feasibility study for Indiana Hospital (Ellis affidavit, Exhibit F), and a patient destination report of Indiana County residents for calendar year 1984 (Ellis affidavit, Exhibit G), 40 percent of the residents of Indiana County who were hospitalized during the time periods covered by these reports utilized hospitals other than Indiana Hospital, i.e., hospitals outside Indiana County. Ellis concludes that the Hospital's primary service area is not a relevant geograhic market for antitrust purposes because "residents of Indiana County can and do readily obtain hospital services at hospitals other than Indiana Hospital (i.e., hospitals *outside* Indiana County)." (Ellis affidavit at 6). In addition, according to a report prepared by Hamilton Associates (Ellis affidavit, Exhibit E), there are seven hopsitals within 25 to 30 miles of Indiana Hospital, and one hospital within 35 miles of Indiana Hospital. This evidence of market share is far from sufficient to establish the market power necessary to significantly restrain trade. *Oksanen*, 745 F.2d at 709. *See Robinson v. Magovern*, 521 F. Supp. 842, 887 (W.D. Pa. 1981), *aff'd.*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982); *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).

Plaintiff asserts that the Certificate of Need itself is sufficient evidence of the relevant geographic market. The Certificate states that "[i]t should be noted that geographic accessibility to these other facilities is less than desirable, particularly during inclement weather, due to the mountainous terrain and poor road conditions." (Certificate of Need at 5). In addition, in a 1976 Program for Development, the Hospital made the following statement:

> Indiana Hospital is the only hospital in Indiana County. It has virtually no competition from other hospitals in the area. Therefore, it must be responsive to the health care needs of (1) the county, and (2) the specialized needs of people living particularly in contiguous counties to the north and east. The hospital must be prepared to function as a coordinator for providing new and expanded health services for its Service Area. It must be prepared to provide either directly or indirectly: emergency care, general acute care, long term care, home care and ambulatory care.

(Program for Development at 3). Plaintiff attempts to utilize these statements as evidence that Indiana County is the relevant geographic market. Plaintiff's contention ignores the fact that (1) statements regarding geographic accessibility to other facilities is merely one factor in determining the relevant geographic market, but that more extensive testimony, i.e. expert testimony, is needed to tie geographic accessibility to other factors, *Steuer & Latham*, 672 F. Supp. at 1512 n. 25 (*citing Military Services Realty*, 823 F.2d at 829; *Forro Precision, Inc. v. IBM*, 673 F.2d 1045, 1058-59 (9th Cir. 1982)); (2) what the Hospital itself perceives to be its competition is irrelevant to the question of whether in fact there existed competition, which requires expert testimony, *id.*; and (3) taken in context, it is clear that this statement relates to the Primary Service Area, an area that has been held to be insufficient in itself to establish a relevant market. *Steuer & Latham*, 672 F. Supp. at 1511.

C. The need to show significant injury to competition

The focus of antitrust law is on promoting competition, not on protecting competitors. *Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 103 (1984). As stated in *Oksanen*:

> As a result, a plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury. For example, the fact that a hospital's decision caused a disappointed physician to practice medicine elsewhere does not of itself constitute an antitrust injury. [*Hyde*, 466 U.S. at 31.] If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

Oksanen, 945 F.2d at 708. *See Nanavati*, 857 F.2d at 121, n. 24.

Even if plaintiff did submit evidence of a restraint on competition in a relevant market, he must go on to prove that the restraint is "substantially adverse." *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967). "Practices that produce only an 'insignificant,' 'de minimus,' 'trivial,' or 'insubstantial' restriction of competition are not unlawful." *Steuer & Latham*, 672 F. Supp. at 1504. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 606 (1972). As discussed in *Tunis II*, "[t]he Sherman Act was designed to prohibit significant restraint of trade rather than to 'proscribe all unseemly business practices;' [*Sitkin Smelting and Ref. Co. v. FMC*

Corp., 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978)]; *see Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n. 15 (1940); and the plaintiff[ ] must have demonstrated some harm to the competitive landscape" as a result of Indiana Hospital's termination of plaintiff's staff privileges. *Tunis II*, 952 F.2d at 728.

The analysis of whether there was a substantial effect on competition requires that the plaintiff put forth at least some evidence of the impact of the exclusion on the market so that a jury would not be forced to speculate as to what the injury might have been. In this case, plaintiff did not present any evidence of adverse effects, apart from the adverse affects to his own practice. In order to show a substantial effect on competition, it is necessary to show that there was either (1) a rise in the price of medical services above a competitive level, (2) a decrease in the supply of doctors in the relevant market, or (3) a decrease in the quality of medical services provided. *Id.* at 29. *See also Nanavati*, 857 F.2d at 121 n. 24. Plaintiff's "anecdotal information" that there has been some increase in price charged for the relevant services as a result of termination of his staff privileges (Miller depo. at 477-78, 480) is far from sufficient to aid a jury in determining the extent of any adverse affects on competition. As to the requirement of showing a decrease in the supply of doctors in the relevant market, plaintiff has presented no evidence tending to show that physicians in the relevant product and geographic market have decreased as a result of defendants' actions.[6] Further, this is not a case where a

[6] Although plaintiff points out that there was a decrease in supply of urologists for a short period of time following termination of his staff privileges, in fact, consumers' choice of urologists increased after 1979. (*See* defendants' answers to interrogatories, Dec. 4, 1991). Furthermore, plaintiff has at no time alleged that the relevant product market is urological services.

representative of a class of competitors is being excluded from the market. *Cf. Weiss* (attempt to exclude osteopaths); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988) (attempt to exclude nurse anesthetists); *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278 (4th Cir. 1986) (attempt to exclude podiatrists). Lastly, there has been no evidence submitted that there has been a decrease in the quality of medical services provided as a result of the termination of plaintiff's staff privileges. Absent such a showing of a rise in price, a decrease in the supply of doctors in the relevant market, or a decrease in the quality of care in the relevant market, there can be no significant effect on competition.

The Court agrees with the *Oksanen* Court, which followed Third Circuit reasoning on this issue as follows:

> The peer review process, by policing the competence and conduct of doctors, can enhance competition. "By restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of care that it delivers." *Weiss*, 745 F.2d at 821 n. 60. Similarly, the friction created between a hospital and a doctor with a legacy of trouble in interpersonal relationships can decrease efficiency, discourage other qualified doctors from joining the staff, and detract from a hospital's ability to provide quality patient service.
>
> In sum, the anti-competitive effects are by no means so clear and one-sided as Oksanen would have them, and the revocation of Oksanen's staff privileges, while undoubtedly impacting adversely on his practice, has not been shown to have had any adverse impact on competition in the relevant market.

Oksanen, 945 F.2d at 709.

Accordingly, since plaintiff has not introduced evidence of market power and has not shown a substantial harm to competition, the Court will grant defendants' motion for summary judgment with respect to plaintiff's Section 1 claim.

IV. Section 2

Section 2 reads in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

15 U.S.C. §2 (1982). The test for determining whether a defendant has monopolized in violation of Section 2 has been articulated by the Supreme Court as "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Weiss*, 745 F.2d at 825 (*quoting Grinnell*, 384 U.S. at 570-71). "A defendant possesses monopoly power if it has the ability to change the competitive variables of a product to the disadvantage of consumers without causing effective competitors to enter the relevant market." *Magovern*, 521 F. Supp. at 886. In the absence of evidence demonstrating the relevant geographic market or facts demonstrating defendants' ability to exert market dominance in that market, it would be impossible for plaintiff to establish that defendants formed a monopoly to prevent him from operating his trade. *Brown*, 767 F. Supp. at 631-32.

Accordingly, defendants' motion for summary judgment as to plaintiff's claim pursuant to Section 2 shall be granted.

An appropriate Order will be issued.

ALAN M. BLOCH
United States District Judge

Date: 3/9/92

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 81-1091

RALPH J. MILLER,

Plaintiff,

vs.

INDIANA HOSPITAL, *et al.*,

Defendants.

JUDGMENT ORDER

AND NOW, this 9th day of March, 1992, upon consideration of Defendants' Motion for Summary Judgment filed in the above captioned matter on December 11, 1991, and for the reasons set forth in this Court's Memorandum Opinion filed herewith,

IT IS HEREBY ORDERED that said Motion is GRANTED. IT IS FURTHER ORDERED that judgment be, and hereby is, entered in favor of defendants and against plaintiff.

ALAN M. BLOCH
United States District Judge

cc: J. Bradley Kearns, Esquire
1311 Frick Building, Pittsburgh, PA 15219

Larry A. Silverman, Esquire
Suite 400, Two PPG Place, Pittsburgh, PA 15222

David Serene, Esquire
52 S. Ninth Street, Indiana, PA 15701

APPENDIX C

Order of the United States District Court for the Western District of Pennsylvania (February 19, 1992)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 81-1091

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, *et al.*,

Defendants.

ORDER

AND NOW, this 19th day of February, 1992, upon consideration of Plaintiff's Motion for Leave of Court to File Supplemental Pretrial Statement filed in the above captioned matter on February 7, 1992, and upon further consideration of Defendants' Response thereto, and Plaintiff's Answer to Defendants' Response,

This Court finds that plaintiff's attempt to submit an expert report of Dr. Klepper to replace that of Dr. Gots' at this time, eleven years after the filing of the complaint, is a gross violation of this Court's discovery and pretrial rules, in that Dr. Klepper had not been disclosed in discovery, nor had he been disclosed at the

time of the pretrial conference. Further, it is clear from the report of Dr. Gots that, unlike Dr. Klepper, he is not an expert in the field of market share and plaintiff cannot plausibly argue that he expected Dr. Gots to so testify. In light of the fact that the case is on the eve of trial, this Court finds that defendants will suffer extreme prejudice if plaintiff is permitted to introduce testimony which was not previously identified by any expert.

Therefore, IT IS HEREBY ORDERED plaintiff's Motion is DENIED.

ALAN M. BLOCH
United States District Judge

cc: J. Bradley Kearns, Esquire
1311 Frick Building, Pittsburgh, PA 15219

Larry A. Silverman, Esquire
Suite 400, Two PPG Place, Pittsburgh, PA 15222

David Serene, Esquire
52 S. Ninth Street, Indiana, PA 15701

APPENDIX D

Opinion of the United States Court of Appeals for the Third Circuit (March 31, 1988)

IN THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

NO. 87-3403

RALPH J. MILLER, M.D.,

Appellant

v.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RAPLH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.

Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 81-1091)

Argued November 6, 1987

Before: SLOVITER and BECKER, *Circuit Judges*, and COWEN, *District Judge*•

(Opinion filed March 31, 1988)

JUDD F. CROSBY (Argued)
Evans, Ivory, Moses,
Hollander & MacVay, P.C.
Pittsburgh, PA 15219

Attorney for Appellant

LARRY A. SILVERMAN (Argued)
Dickie, McCamey & Chilcote, P.C.
Pittsburgh, PA 15222-5402

Attorney for Appellees

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

In this antitrust case filed by a physician against a hospital and members of its administrative and medical staff the district court entered summary judgment for the defendants based on its conclusion that the hospital's decision to terminate the physician's staff privileges was supported by "substantial evidence" of the physician's unprofessional conduct. On appeal, we must decide

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• Honorable Robert E. Cowen, United States District Judge for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

whether the court erred as a matter of law in using a "substantial evidence" standard for entry of summary judgment.

I.

Plaintiff Ralph J. Miller is a licensed physician and surgeon specializing in urology. He was a teaching fellow at the University of Pittsburgh for several years and has published numerous articles in the area of his medical specialty. He established a practice in Indiana, Pennsylvania in 1959 after obtaining staff privileges in the Department of Surgery at Indiana Hospital.[1] Indiana Hospital is the only general hospital in the County of Indiana, a county with a population of approximately 93,000 persons and an area of 825 square miles.

Several years after moving to Indiana, Miller purchased land and built a five-office medical building two miles from the hospital. In 1975 Miller erected another building on the land, in which he envisioned housing a comprehensive family-oriented medical center, which was to include a group practice, with pediatricians, family practitioners, and medical and surgical specialists. The center also included on-site laboratory and radiology services which, Miller has averred, it could and did provide "at lower cost than the same services at the hospital." App. at 151.

According to the affidavits of Miller and others, the administrators of Indiana Hospital perceived Miller and his expansion plans as a threat to the hospital. For example, William Peters, Administrator of the hospital

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1. The grant of hospital staff privileges, also known as admitting privileges, is required before a physician may admit or treat patients at that hospital. *See generally* Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 Houston L. Rev. 707 (1981).

in the 1960's, averred that in the mid-1960's Henry Hild, Chairman of the Board of the hospital, told Peters that he disliked Miller and was concerned about Miller's plans to expand his health care holdings. Robert Knight, Comptroller of the hospital in the early 1970's, averred that people within the hospital administration were fearful that Miller and his expansion plans posed a threat to the hospital and that they wanted to "gather sufficient medical staff support to keep Dr. Miller from hiring good doctors to staff his medical center." App. at 140-141. Don Gaydos, Director of Fiscal Services at the hospital in the early to mid 1970's, averred that Donald Smith, President of the hospital, told Gaydos "to befriend Dr. Miller so that I [Gaydos] could gather information on what and how Dr. Miller was planning as to expansion of his medical office building and his health care center so that I could report these things back to Mr. Smith." App. at 138.

In 1977, a patient under Miller's care at the hospital died. After a member of the medical staff's executive committee wrote several letters to the staff's president regarding the allegedly inadequate care Miller had provided to the deceased patient and others, the hospital's executive committee held an informal meeting, which Miller attended. The executive committee thereafter sent Miller written notice of its decision to recommend to the hospital's board of directors that Miller's staff privileges be revoked.

Following Miller's demand for a hearing, the executive committee notified Miller in writing of the hearing date, the charges against him, and the names of the witnesses who were to appear. The hearing committee was comprised of three members of the hospital's medical staff and one member of the dental staff; the hospital's legal counsel presided. Miller was represented by counsel, and was able to present and cross-examine witnesses. The hearing lasted for three

days, produced over twenty-two hundred pages of transcript testimony and exhibits, and resulted in a recommendation that Miller's staff privileges be revoked.

Specifically, the hearing committee found that Miller had exhibited "disruptive, insulting, intimidating, disrespectful, disparaging, abusive and other improper behavior" toward various members of the staff, App. at 287-90; that he had acted improperly in the case of the deceased patient by failing to request a medical consultation, by failing to order certain tests, and by making improper entries in the patient's record; that he had failed to comply with an order of the Bureau of Medical Assistance barring him from writing Medical Assistance prescriptions; that he had acted unprofessionally by discussing confidential medical information with a layperson; and that he had failed to carry out certain administrative duties.

The executive committee of the medical staff adopted the hearing committee's recommendation, as did the hospital's Board of Directors. In accordance with the hospital's bylaws, Miller's staff privileges were then revoked.[2]

Miller filed an action against the hospital in the Court of Common Pleas of Indiana County, alleging, *inter alia*, breach of contract, defects in the hearing proceedings, and Fourteenth Amendment due process violations. The court granted his *ex parte* motion for a

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2. Commentators have explained that the absence of staff privileges is devastating to a physician, especially to a specialist such as a surgeon, who depends to such a large degree on the technology and equipment found only in a hospital setting, and puts the physician at "a competitive disadvantage, if for no other reason than it connotes a second-class practitioner." Dolan & Ralston, *supra*, 18 Houston L. Rev. at 713-14; *see also* Weiss v. York Hospital, 745 F.2d 786, 794 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

preliminary injunction, but subsequently dissolved the injunction and denied his request for a permanent injunction. The Superior Court of Pennsylvania affirmed the trial court's denial of injunctive relief, finding that "the charges against [Miller] were supported by sufficient evidence" and that Miller "was dismissed in a fair and impartial manner in accordance with the hospital bylaws." *Miller v. Indiana Hospital*, 277 Pa. Super. 370, 380, 419 A.2d 1191, 1196 (1980). The Supreme Court of Pennsylvania denied Miller's petition for allowance of appeal. *See* App. at 24.

In 1977 and 1978, Miller applied for and was denied staff privileges. In 1979 the hospital refused even to consider his application for staff privileges for 1980, and for the next three years it refused even to furnish him with an application.

In 1981 Miller filed the present action in federal district court in which he named as defendants the hospital and approximately twenty-five individual hospital administrators and medical staff members (collectively referred to as "the hospital"). The complaint alleged a conspiracy to deprive Miller of his civil rights and violations of both federal and state antitrust laws and various other state law claims. Miller sought an injunction requiring the hospital to accept and process his application for staff privileges, as well as compensatory and punitive damages.[3]

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3. There is some ambiguity in the record as to whether this action is directed to the hospital's initial termination of Miller's privileges or its subsequent refusal to consider his application for reinstatement. The complaint suggests the latter; amendments thereto include the former. Ruling on the defendants' motion to dismiss, the district court determined that the substance of Miller's complaint was limited to the hospital's refusal to accept or process his applications for staff privileges; however, in ruling on the

The district court dismissed all of Miller's claims except for the antitrust claims, *Miller v. Indiana Hospital*, 562 F. Supp. 1259 (W.D. Pa. 1983), and Miller does not appeal from that ruling. After further discovery, the respective parties moved for summary judgment on the remaining antitrust claims.

The district court, relying on another decision from the same district, ruled that in order for a plaintiff physician to withstand summary judgment in an antitrust action arising out of a hospital's decision to terminate the physician's staff privileges, "the plaintiff must demonstrate on the basis of the record before the hospital at the time of its decision, that the hospital lacked substantial evidence in support of its ultimate decision." *Miller v. Indiana Hospital*, No. 81-1091, slip op. at 11-12 (W.D. Pa. February 10, 1986) (quoting *Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1372 (W.D. Pa. 1982)). The court further stated that "whether there is substantial evidence to support the decision of the hospital committee to discharge a physician or to deny staff privileges to that physician is a question of law for a reviewing court and the resolution of that question need not await trial." *Miller v. Indiana Hospital*, No. 81-1091, slip op. at 11.

After reviewing the transcript of the proceedings before the hospital's hearing committee, the court found the requisite "substantial evidence." It therefore granted the hospital's motion for summary judgment,

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summary judgment motion at issue in the present appeal, the court focused on the revocation as well. At oral argument before this court, counsel for Miller stated that both the initial revocation and the subsequent refusal to reinstate were at issue. We do not attempt to resolve this discrepancy because it would not affect the outcome of this appeal. For the sake of simplicity, we will refer to the "termination" of Miller's staff privileges as encompassing the initial revocation and subsequent refusals to reinstate.

denied Miller's motion for summary judgment, and dismissed the pendent state law claims. *Miller v. Indiana Hospital*, 660 F. Supp. 250 (W.D. Pa. 1987). Miller appeals.

II.

We have plenary review of the district court's application of legal precepts, in this case its use of a substantial evidence test to grant summary judgment. *Universal Minerals, Inc. v. C.A. Hughes & Company*, 669 F.2d 98, 101-02 (3d Cir. 1981). The hospital argues that because this court stated in *Weiss v. York Hospital*, 745 F.2d 786, 820 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), that a medical staff "is . . . entitled to exclude individual doctors . . . on the basis of their lack of professional competence or unprofessional conduct," the threshold inquiry in an antitrust staff privilege case is the professional competency of the individual physician. The hospital misreads *Weiss*. Nothing in that case suggests that the usual antitrust inquiry may be avoided merely because the conspiracy alleged involves a hospital.

In *Weiss*, the jury had found in favor of the plaintiff class of osteopaths on its claim that in refusing to grant staff privileges the members of the defendant hospital's medical staff had conspired in violation of section 1 of the Sherman Act. *Id.* at 799-801. On appeal, this court applied traditional antitrust analysis to the defendants' exclusionary conduct. *Id.* at 812-30. In contrast, the substantial evidence test used by the district court here and in *Pontius* is derived from administrative law and reflects the deference that a judicial body owes to the administrators entrusted with regulatory authority. *See Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477-88 (1951). That test has no place in an

antitrust case where Congress has given the jury the responsibility of resolving disputed fact issues. *See* 15 U.S.C. § 15.[4]

In this case, Miller contends that his hospital staff privileges were revoked and his applications for reinstatement denied because defendants wished to stifle his competition. He contends that the outcome of the hearing pursuant to which his privileges were revoked was predetermined and that he was treated more severely than other physicians whose competence was in question but who presented no economic threat to the defendants. Defendants' argument that they revoked Miller's staff privileges because of his professional incompetence and unprofessional conduct is a defense they may present before the jury which, if convinced, will absolve them of any antitrust liability. It is inappropriate and unprecedented, however, to pretermit the jury's consideration of the parties' various contentions under the rubric of the substantial evidence test. Such a test defers to the manner in which defendants themselves, who are parties in interest, weighed the evidence and drew inferences. Moreover, the substantial evidence test effectively eliminates any application of the antitrust laws to defendants' actions. It is apparent therefore that the district court erred as a matter of law in applying a substantial evidence test to determine if there were genuine issues of material fact to withstand summary judgment.

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4. The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 *et seq.*, applicable to professional review actions commenced on or after November 14, 1986, provides a degree of immunity to hospital peer review decisions. Because this legislation is not applicable to this litigation, we do not decide if the hospital's actions were immunized thereunder.

III.

Because our review of an order granting summary judgment is plenary, *see Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), we consider the hospital's summary judgment motion under the proper legal standard. Summary judgment may be granted only if there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). While the moving party has the burden initially of identifying that evidence that demonstrates the absence of a genuine issue of material fact, the nonmoving party must make a sufficient showing to establish the existence of every element necessary to its case and on which it bears the burden of proof. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987). Credibility determinations are not the function of the judge; rather, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 106 S.Ct. at 2513.

The summary judgment standard is no different in antitrust litigation than in any other. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986); *see also Tunis Brothers Co., Inc. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3568 (U.S. Feb. 22, 1988) (No. 87-745). A claim under section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), requires proof of a contract, combination or conspiracy, a restraint of trade, and an effect on interstate commerce. *See Weiss*, 745 F.2d at 812. We do not understand the hospital at this stage of the proceeding to be challenging either the elements of

conspiracy or the interstate commerce effect of its actions;[5] the central issue for summary judgment was the reasonableness of the restraint.

Miller concedes for the purpose of this appeal that a rule of reason analysis is applicable to the hospital's conduct.[6] The hospital argues that its conduct was patently reasonable because Miller, after a full hearing approved by the state court, was found to have demonstrated professional incompetence and unprofessional conduct. However, Miller has produced evidence which, if believed by the jury, would show that, in fact, the hospital's revocation of his privileges, although ostensibly for professional incompetence and unprofessional conduct, was motivated by the

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5. Under this court's precedent, the joint action taken by the medical staff satisfies the conspiracy requirement. *Weiss*, 745 F.2d at 814. Similarly, a hospital's treatment of out-of-state patients, purchase of medical supplies from out of state, and receipt of money from out of state, including federal funds, satisfies the requirement of affecting interstate commerce. *See Weiss*, 745 F.2d at 824-25; *see also* Cardio-Medical Associates, Ltd. v. Crozier-Chester Medical Center, 721 F.2d 68 (3d Cir. 1983).

6. In Weiss v. York Hospital, 745 F.2d 786 (1984), *cert. denied*, 470 U.S. 1060 (1985), we applied a *per se* analysis to the antitrust claim of the class of osteopathic physicians based on the denial of staff privileges at a hospital. We reasoned that the hospital's actions were the functional equivalent of a group boycott, which is illegal *per se* under section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). *See* United States v. General Motors Corp., 384 U.S. 127, 145-46 (1966). We recognized that in a hospital staff privilege case in which the hospital defends on lack of professional ability, the rule of reason test would apply. *Weiss*, 745 F.2d at 820-22.

The Supreme Court recently rejected application of a *per se* analysis in a case involving the expulsion of a member from a wholesale buying cooperative. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). Because Miller accepts the rule of reason test for purposes of this appeal, we need not decide in this case the effect of *Northwest Wholesale* on our holding in *Weiss*.

anticompetitive purpose of destroying Miller's competition or prospective competition.

The affidavits of former hospital administrators, referred to in Part I above, provide evidence that even before the death of Miller's patient, the hospital expressed concern about Miller's competition. Miller's affidavit sets forth evidence of at least one example of the hospital's interference with his recruitment of medical staff for his proposed medical center by encouraging a pediatrician to break his contract with Miller; of its failure to terminate the staff privileges of other physicians whose professional infractions were allegedly more substantial than Miller's;[7] and of irregularities and possible conflicts of interests in the hearing process itself, such as the fact that the presiding officer of the hearing was counsel for the hospital and that the chairman was a physician against whom Miller had previously filed charges of unethical conduct with the state board of licensure.

The evidence produced by Miller is sufficient to raise a genuine issue of material fact as to whether the hospital's conduct in revoking Miller's staff privileges was, as the hospital claims, because of his incompetence and hence a reasonable restraint or whether it was a result of anticompetitive motivation

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7. Miller points, for example, to evidence that even though the hospital had strong reasons to believe that one of its physicians who was being treated for clinical depression was addicted to drugs and that that doctor had failed to make rounds, failed to attend staff meetings, delayed treating patients and scheduling patient operations, and overprescribed narcotics, the hospital merely placed that doctor on probation. In *Weiss*, we noted the relevance for antitrust purposes of a hospital's failure to apply the same standards to all physicians seeking staff privileges. We explained that "we do not doubt that a hospital could exclude an applicant from staff privileges either because he is not medically qualified or because of unprofessional conduct, *so long as the hospital applies the same standards to all applicants.*" 745 F.2d at 821 n.60 (emphasis added).

and thereby constituted a prohibited restraint of trade. That issue is for the fact finder which, if it decides that the restraint of trade was unreasonable, will also fix the amount of any damages. *See Weiss*, 745 F.2d at 817. At that stage, it would be the responsibility of the court to determine whether, on the basis of the evidence relating to Miller's professional competence, it should direct the reinstatement of his staff privileges.[8]

IV.

For the foregoing reasons, we will reverse the district court's order granting the hospital's motion for summary judgment, and remand for further proceedings consistent with this opinion.[9]

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8. Because the parties have focused only on Miller's claim under Section 1 of the Sherman Act, we do not reach Miller's claim that the hospital also violated section 2 of the Sherman Act. A ruling on this claim would require the district court to rule on the relevant product and geographic markets and determine whether the hospital occupies a position of monopoly within them. *See Weiss*, 745 F.2d at 825. We assume that on remand there will be further development of the record. *See* Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 574 (6th Cir. 1986).

9. The hospital contends, as an additional matter, that it is entitled to summary judgment because it is immune from antitrust review under the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943). The district court did not reach this issue, and, given the factual intricacies involved, for example, whether the Pennsylvania statutes and regulations regarding physician peer review constitute the requisite state action, we believe that it would be more appropriate for the district court to address it in the first instance.

We note that the Supreme Court has granted certiorari in one case in which a court of appeals held that a private hospital's revocation of a doctor's staff privileges was immune from federal antitrust liability under the *Parker* doctrine. Patrick v. Burget, 800 F.2d 1498 (9th Cir. 1986), *cert. granted*, 108 S.Ct. 65 (1987). *Patrick* was argued on February 22, 1988; the district court may be well-advised to await the Court's decision should the immunity issue become relevant in this case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E

Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit (September 16, 1992)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3147

RALPH J. MILLER, M.D.,

Appellant,

v.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH, WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS; M.D.; RALPH P. GOLDSTROHM, M.D.; DAVID C. HUGHES; M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HEALTH; H. ARNOLD MULLER, M.D.

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 0315-2 : 81-01091)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* and BECKER, STAPLETON, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and ALDISERT,* *Circuit Judges.*

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

MARK J. GREENBERG
Circuit Judge

DATED: SEP 16 1992

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* Senior Circuit Judge Aldisert voted only as to panel rehearing.

APPENDIX F

Excerpts (Affidavits) from Appendix to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment (January 3, 1992)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

No. C.A. 81-1091

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, a corporation, HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; and RALPH D. BROWN, M.D.,

Defendants.

APPENDIX TO PLAINTIFF'S BRIEF IN
OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

The following documents and materials are hereby appended to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and submitted for consideration of the Court:

1. Affidavit of Ralph J. Miller.
2. Affidavits of Lee Dippery, Robert Knight, Donald Gaydos, Harold Cottle, William Peters and Betty Coleman.
3. Portions of transcript of deposition of Robert Knight.
4. Portions of transcript of deposition of Don Gaydos.
5. Report of Ronald E. Gots, M.D., Ph.D.
6. Portions of Indiana Hospital Pa. Certificate of Need Application Proposal for Computerized Tomographic Whole Body Scanner.
7. Portions of Program for Development, Indiana Hospital, dated February 16, 1976.

Respectfully submitted,

EVANS, IVORY, MOSES,
HOLLANDER & MAC VAY, P.C.
J. BRADLEY KEARNS
J. Bradley Kearns
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF ALLEGHENY)

The undersigned hereby deposes and states as follows:

1. My name is RALPH J. MILLER, plaintiff, and I am a physician licensed by the Commonwealth of Pennsylvania, a Board Certified Urologist and a Fellow of the International College of Surgeons. I graduated from the University of Pittsburgh Medical School in 1952. I was a teaching fellow at the University of Pittsburgh for several years and I have published numerous articles in the area of my medical speciality.

2. I am married, fifty-nine (59) years old and I have two adult sons, one a physician, and I have lived in Indiana, Pennsylvania, with my family since 1959.

3. I obtained staff privileges at the Indiana Hospital in 1958 in the Department of Surgery and retained these privileges for each of the next nineteen (19) years.

4. During 1963 and 1964 my wife and I purchased a six (6) acre tract of land on Indian Spring Road which is approximately 2.0 miles from the Indiana Hospital.

5. In 1964, through a corporation, my wife and I had a professional office building created on this tract, which building can accommodate five (5) separate physician offices. I moved my office from a rental building in downtown Indiana to the professional office building when it was completed.

6. In approximately 1970 my wife and I built an eight (8) unit apartment building on the rear of the tract and at about the same time started plans for another building which would house a medical center.

7. The medical center plans included a family oriented group practice including pediatricians, family practitioners and medical and surgical specialists, as well as laboratory and radiology services on site.

8. The medical center building as erected in 1975 has capacity to accommodate three (3) or four (4) physicians and is owned by myself and my partner. The building was designed so as to increase the size of the facility as the center expanded.

9. As the planning and erection phase of the medical center were under way it was made clear to me by defendants including Williams, William Evans, Goldstrohm, Mitchell and Weiner, that there was great concern and resentment by them and others at the hospital about my medical holdings and plans to continue expansion.

10. The hospital was concerned about competition and had its own plans to construct a professional office building on the premises adjoining the hospital. The hospital had its own laboratory and radiology services and had concerns about generating sufficient inpatient days to remain financially above board. These concerns were expressed by Mr. Hild to staff physicians who were responsible for admitting inpatients. The services at the medical center could be and were provided at lower cost than the same services at the hospital.

11. When I attempted to staff the medical center I encountered resistance and, for example, despite an executed agreement with one physician resulting in litigation, the hospital physicians sided with the pediatrician trying to break his contract. These physicians in addition to just participating in the litigation on behalf of Dr. McKown, signed public

statements for the media stating they "oppose and deplore the action by Ralph J. Miller" in holding the physician to the written contract. These physicians include Goldstrohm, Williams, Waldo, Freda, Hughes, William Evans, Hanna, Weiner and Mitchell.

12. The opposition to my medical holdings culminated in the hospital and staff physicians working together to lift my staff privileges at the hospital on charges and incidents far less serious than those committed by other physicians against whom no similar action was taken.

13. While the revocation proceedings may have been deemed fair by some as consistent with hospital by-laws, the conduct of which I have become aware indicates a predetermined outcome of the proceedings. This includes, for example, efforts by Donald Smith to have witnesses change their testimony, the hospital expert witness lying under oath about contacts with the hospital attorney, Mr. Hild stating the outcome of the proceedings before they ended, medical records being altered, the chairman appointed by Mr. Hild to review the charges and make recommendations had been earlier reported by me to the Commonwealth licensing agency for physicians for unprofessional conduct and, hospital counsel sitting as the hearing officer. These circumstances can be presented at trial through admissible evidence.

14. The revocation proceedings were followed in our local newspaper and other media as would be expected and my professional reputation in Indiana County was severely damaged. Without privileges I could not recruit or otherwise operate the medical center.

15. Since the removal of my staff privileges I have each year reapplied for privileges at the hospital and the defendants, unlike in others' efforts to obtain privileges,

have refused to process my requests as they are required to do by hospital policies, customs and law.

16. The hospital has accepted and processed applications of persons far less qualified to practice than myself and granted privileges to such physicians even in the face of unfavorable recommendations from prior employers and explicit statements that such candidates were rated below average in overall performance.

17. Without ability to offer medical treatment through the hospital's facilities and services, I have continued to practice medicine from my office, although my practice now is more general and does not include any in-hospital operative procedures. Before revocation of my privileges from 1971 to 1977 I averaged 240 yearly in-hospital operative procedures.

18. My speciality practice relies heavily on patient refererrals from other physicians. For example in 1970, 1971 and 1972 I averaged 130 physician referrals for each year. As a result of the actions complained of in this suit my total physician referrals for 1979 was four (4) and since then, none.

19. Since revocation of my staff privileges I have received no referrals from the Indiana Hospital emergency room and ambulance service referral system, another important source of new patients for my specialty practice.

20. For a substantial time after my privileges were revoked, Dr. Park was the one and only urologist available to provide in-hospital treatment and services in Indiana County.

21. As a result of defendants' conduct I have suffered substantial economic harm and my remaining patients and potential patients have been harmed and limited in choice of medical providers.

22. I seek to recommence as soon as possible the practice of my surgical specialty which depends on the use of hospital facilities and services which are controlled exclusively by defendants.

RALPH J. MILLER
Ralph J. Miller

Sworn to and subscribed
before me this 28th day of
March, 1985.

CARRIE L. RUPNIK
(Notary Public)

CARRIE L. RUPNIK, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES SEPT. 9, 1985
Member, Pennsylvania Association of Notaries

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF BLAIR)

The undersigned hereby deposes and states as follows:

1. I am LEE M. DIPPERY, a physician, who worked in the Emergency Services Department of Indiana Hospital from approximately May, 1975, until May, 1977.

2. On first starting my duties at the hospital I was called to the office of Donald Smith who stated his concerns that Ralph Miller, a local successful physician, was going to be a problem to the hospital and to me.

3. Mr. Smith's tirade and hostility toward Dr. Miller culminated in a warning to me regarding Dr. Miller.

4. Subsequently, I was warned by Dr. Lapsley that a perception existed that I was friendly with Dr. Miller and that this would cause difficulties for me.

5. Based on conversations and statements known to me I am convinced that the hospital administration and certain staff members were attempting to remove Dr. Miller from the hospital on a meritless allegation of incompetence.

6. While I was at Indiana Hospital there was a movement by certain physicians including Hanna, Evans, Waldo, Goldstrohm, Williams, Hughes and Weiner to have Dr. Miller's staff privileges taken and I overheard conversations after meetings which led me to believe that meetings occurred where this matter was discussed by physicians.

7. I remember at one time one of the physicians pointing out the yellow-page telephone listing of the Indiana Medical Center and his expression of resentment about the association of physicians.

LEE M. DIPPERY
Lee M. Dippery

Sworn to and subscribed
before me this 26 day of
Feb., 1985.

JOHN B. FRIENO
(Notary Public)

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF INDIANA)

The undersigned hereby deposes and states as follows:

1. My name is DON GAYDOS of Indiana, Pennsylvania. During the years 1971 to 1976 I worked at Indiana Hospital and for part of that time I was Director of Fiscal Services.

2. During my employment at the hospital I became aware that the hospital administrator, (SMITH) and others, were attempting to have Dr. Ralph Miller removed from the medical staff.

3. These people were concerned that Dr. Miller's medically related holdings such as the medical center posed a threat to the hospital. Further, there was concern that if new physicians were employed by Dr. Miller, he would control these physicians in their role on hospital staff and retain too much power within the hospital.

4. Even before any efforts were made by defendants to remove Dr. Miller from the medical staff, I was told by Don Smith that this was going to be done in the future.

5. I was requested by Don Smith to befriend Dr. Miller so that I could gather information on what and how Dr. Miller was planning as to expansion of his medical office building and his health care center so that I could report these things back to Mr. Smith.

6. Defendants' concerns about Dr. Miller were not related to his abilities as a physician, Mr. Smith in 1974 having even referred myself and family to Dr. Miller. The

concerns as indicated to me were that the power and control held by them was threatened by Dr. Miller's health related expansion and plans for expansion.

7. Mr. Hild, in conjunction with Mr. Smith, worked to resist Dr. Miller's increased influence with the medical staff.

8. As the chief fiscal officer at the hospital, I know that the hospital held essential facilities for the practice of medicine in our county and retained exclusive control over these facilities.

DON GAYDOS
DON GAYDOS

Sworn to and subscribed
before me this 26 day
of FEB., 1985.

STANLEY J. HONACH
(Notary Public)

STANLEY HONACH, NOTARY PUBLIC
INDIANA BOROUGH, INDIANA COUNTY
MY COMMISSION EXPIRES MAY 21, 1988
MEMBER (ILLEGIBLE)

STATE OF CALIFORNIA)
) ss:
COUNTY OF MERCED)

The undersigned hereby deposes and states as follows:

1. My name is ROBERT KNIGHT and in the early 1970's I was the Comptroller at Indiana Hospital.

2. During my employment at the hospital a successful urologist, Ralph Miller, was making plans for expansion of his health-related activities including a family oriented medical center where staff physicians would be employed by Dr. Miller.

3. Based on my presence at meetings and conversations outside of meetings I discovered that certain powerful people within the hospital structure such as Henry Hild, William McMillen, John Simpson, Tom Barbor and others were fearful that Dr. Miller with these plans posed a threat to the hospital and other doctors.

4. The threat perceived by these people was that Dr. Miller would gain too much power within the hospital as well as drain business from the hospital in the form of services such as out-patient surgery, radiology services, laboratory services and others.

5. The feeling at that time amongst these people in control of the health services in Indiana County was that they could gather sufficient medical staff support to keep Dr. Miller from hiring good doctors to staff his medical center.

6. The administration took specific steps to discredit Dr. Miller so as not to have to compete with another health-care provider in the county.

7. Numerous times I heard statements especially from Henry Hild that Dr. Miller and his plans for a competing health center separate from the hospital would have to be stopped.

ROBERT KNIGHT
Robert Knight

Sworn to and subscribed
before me this 26th day of
February, 1985.

THOMAS O. PEDREINA
(Notary Public)

OFFICIAL SEAL
THOMAS O. PEDREINA
NOTARY PUBLIC—CALIFORNIA
MERCED COUNTY
My Comm. Expires July 25, 1986

[692] **APPENDIX G**

Excerpts from Transcript of Deposition of Respondent Henry F. Hild (November 8, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 81-1091

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; and, RALPH R. BROWN, M.D.,

Defendants.

DEPOSITION OF HENRY F. HILD

[693] DEPOSITION OF HENRY F. HILD, a Defendant herein, called by the Plaintiff, taken pursuant to the Federal Rules of Civil Procedure, by and before Kelly L. Smith, a Court Reporter and a notary public in and for the Commonwealth of Pennsylvania, at the law offices of Dickie, McCamey & Chilcote, Two PPG Place, Suite 400, Pittsburgh, Pa., on Wednesday, November 8, 1989, at 9:40 a.m.

COUNSEL PRESENT:

For the Plaintiff:	Evans, Ivory, Moses, Hollander & MacVay by Judd Crosby, Esq.
For the Defendants:	Dickie, McCamey & Chilcote by Larry Silverman, Esq.
Also Present:	Ralph J. Miller, M.D.

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By Mr. Crosby	3, 183
By Mr. Silverman	177

[694] PROCEEDINGS

HENRY F. HILD, a Defendant herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. CROSBY:

Q. State your name and address. A. I am Henry F. Hild, H-i-l-d, 256 Silver Street, North Granby, Connecticut 06060.

Q. Mr. Hild, could you give us the dates of your tenure as president and/or chairman of the board of directors of Indiana Hospital? A. I am going to have guess that. I would guess it would be 1965 to about 1985 or 1986.

MR. SILVERMAN: I think we have supplied that information. I think '84 was when he actually retired and left the board.

Q. Is that consistent with your recollection what your counsel has indicated, Mr. Hild? A. I would think so.

Q. During the course of those 19 years, did [695] your duties as president or chairman change over the course of those years? A. I don't believe so.

Q. Could you tell me what your duties were as president and/or chairman of the board at the hospital? A. First, I don't believe there were any specific duties. It was the responsibility to conduct the meetings of the board. The administrator reported to me, and that is about it.

Q. During the course of those 19 years, did you actually spend your working day or any part of your working day at the hospital on a regular basis? A. No. I spent time there on visits and that sort of thing but not as a working day.

Q. Could you give me a rough idea on average of how many hours each day you would be at the hospital to fulfill your duties as president and/or chairman of the board? A. For many years I would probably be in the hospital an hour or two once a week.

Q. Then, did that change? A. Oh, that would change depending upon [696] circumstances. If there were subjects that came up, I would take more time particularly for a discussion with the administrator, and I should also say during the building program I did spend more hours there, but I was not a workman.

Q. The one to two hours per week on an average that you spent there, did that include the meetings that you would conduct of the board? A. No.

Q. That was in addition to conducting meetings? A. Right.

Q. During your tenure as president and/or chairman of the board, did you personally, Mr. Hild, ever conclude that Ralph Miller was unfit to serve on the medical staff of the hospital? A. That was in the hands of the medical staff, not me.

Q. You never personally made that conclusion yourself? A. That is right.

Q. Did you ever as chairman of the board vote on any issue in any capacity regarding whether or

* * *

[697] A. Park, yes.

Q. Do you recall what you suggested to Mrs. London about the care and treatment of her husband? A. I didn't suggest it. The medical staff advised her what to do. I did not suggest anything to her.

Q. Do you know what the medical staff advised her to do? A. No.

Q. In October of 1977 if you recall, was there a need for more than one urological surgeon in Indiana County? A. Yes.

Q. Do you have an idea of what the needs were in October of '77 for urological surgeons? A. You have to ask the medical staff at that time. I am not going to comment on that.

Q. It appears to me, Mr. Hild, from this document, that is Exhibit No. 8, that it is a chronological by time indication of what you were doing? A. That is right, what I was doing.

[698] * * *

to see if this question was asked. Let's take a short break.

(A brief recess was taken.)

Q. You had indicated earlier, Mr. Hild, that you did become aware of which ones generated more revenue for the hospital than others. When was it that you became aware of that in your tenure as board chairman? A. I don't believe it was a question of being aware of what generated the most profit. We looked at the financial figures and total and thought we were all right or not all right. There was no real emphasis on which was doing the best or not doing the best. That was up to the controller to set selling, so to speak, prices for what the costs are.

Q. And you don't know which of those markets or services did better than others? A. No, I don't.

MR. SILVERMAN: He already answered that.

Q. During your tenure as president or chairman of the board at the hospital, did you become aware of any facility in Indiana County that provided radiology services in addition to those [699] services at Indiana Hospital? A. No.

Q. In your tenure as president or chairman of the board of Indiana Hospital, did you become aware of any facility in Indiana County that provided laboratory services, that is to say for example analysis of urine and analysis of blood, that was located in Indiana County in addition to Indiana Hospital? A. I don't believe so.

Q. During your tenure as president or chairman of the board of Indiana Hospital, did you become aware of any facility in Indiana County that provided facilities for surgical operations other than those operations that could be done in a physician's office? A. I don't believe so, no.

Q. During your tenure as president or chairman of the board of Indiana Hospital, did you become aware of any facility in Indiana County that had the emergency room facilities that the Indiana Hospital had? A. No.

* * *

[701] **APPENDIX H**

Excerpts from Transcript of Deposition of Respondent Donald F. Smith (November 10, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 81-1091

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL; a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; and, RALPH R. BROWN, M.D.,

Defendants.

DEPOSITION OF DONALD F. SMITH

[702] DEPOSITION OF DONALD F. SMITH, a Defendant herein, called by the Plaintiff, taken pursuant to the Federal Rules of Civil Procedure, by and before Kathy D. Landock, a Registered Professional Reporter and a Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Dickie, McCamey & Chilcote, Suite 400, Two PPG Place, Pittsburgh, PA 15222, on Friday, November 10, 1989, at 10:08 a.m.

COUNSEL PRESENT:

For the Plaintiff:	Evans, Ivory, Moses, Hollander, & MacVay by Judd F. Crosby, Esq.
For the Defendants:	Dickie, McCamey & Chilcote by Larry A. Silverman, Esq.
Also Present:	Ralph J. Miller, M.D.

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By Mr. Crosby	3
By Mr. Silverman	241

[703] PROCEEDINGS

DONALD F. SMITH, a Defendant herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. CROSBY:

Q. Hi, Mr. Smith. Would you give us your full name. A. Donald F. Smith.

Q. And your current address? A. 128 Concord Street, Indiana, Pennsylvania.

Q. How old are you, Mr. Smith? A. 74.

Q. Mr. Smith, do you have any ongoing health or physical impairments of any type? A. I have coronary sclerosis, coronary artery disease.

Q. Have you ever been operated on for that impairment? A. I have had a balloon angioplasty.

Q. Just one?

[704] Q. At any time after June 6, 1978, did you ever reverse your opinion that Dr. Miller was capable of practicing the finest type of and standard of urological medicine in the country? A. No.

Q. You still believe that? A. Yes.

Q. It's my understanding, Mr. Smith, that you began working at the Indiana Hospital in 1970 and you continued working there up until September 28 of 1981; is that correct? A. That's right.

Q. And during that period of time, you were either the administrator or president, but in either case, you were the chief executive officer of the hospital? A. That's correct.

Q. What were your duties as the chief executive officer of Indiana Hospital?

MR. SILVERMAN: Just for the record, and I will let him answer, he has answered this question in No. 8 of the Interrogatories, but he can answer. Just so the record is clear that counsel is [705] violating Judge Bloch's admonition.

MR. CROSBY: Let me rephrase the question, because I don't want to violate an admonition.

Q. In Answers to Interrogatories, Mr. Smith, you have indicated that your responsibilities were to direct the daily operation of the hospital according to policies as set forth by the board of directors; is that correct? A. That's right.

Q. What did you actually do on a day-to-day basis in terms of directing the daily operation of the hospital? A. I was in contact with, from time to time, the department heads of the hospital, members of the medical staff, the nursing staff, and from time to time members of and the chairman of the board of directors, Mr. Hild, and at least once a month the executive committee of the board.

Q. Could you give us your estimate as accurately and as best you can give it to us as to how frequently Henry Hild would have actually been on the premises of Indiana Hospital attending to his duties as chairman of the board during your tenure

* * *

[706] started?

THE WITNESS: I suspect sometime after 1975 or '76.

Q. It would be my understanding, Mr. Smith, that in your capacity as a chief executive officer that you reported directly to Henry Hild the entire time of your tenure as a chief executive officer; is that right? A. To Henry Hild as chairman of the board of directors.

Q. During your tenure as a chief executive officer, were there any other positions or titles in the hospital that reported directly to Henry Hild as opposed to going through you as the chief executive officer? A. No.

Q. That would be true of all the financial operations of the hospital? A. That's correct.

Q. Did you have any duties specifically with reference to the financial operations of the hospital? A. The director of finance reported to me.

[707] Q. Do you recall during your tenure whether or not the director of finance made one regularly scheduled report to you or were there different types of reports that you got from the director of finance? A. The major report on a monthly basis was reviewed with me before being presented by the director of finance to the board of directors at the regular monthly meeting.

Q. Do you recall if those regular monthly reports from the director of finance included any type of breakdown in terms of any division or department of the hospital whose gross proceeds that it was generating would be up or down? A. The report consisted of a statistical section and a financial section. And in both instances, the figures would reflect activity of all the departments.

Q. And it would break it down by department? A. Yes, that's correct.

Q. So during your tenure as chief executive officer, you were aware of what divisions and departments were doing well and what divisions or

* * *

[708] medical center were, and I'm referring to the doctors that were listed in the yellow pages directory that you had seen?

MR. SILVERMAN: Again, I'll object to the form, because I don't know if these doctors were associated or not, all we know is there was an ad in the yellow pages that said so. You can answer.

THE WITNESS: I know at least one of them was advertised as being an internist.

Q. Do you know that person's name? A. No.

Q. As the chief executive officer at Indiana Hospital, Mr. Smith, do you recall having any concerns at all about the fact that it was your perception that at the Indiana Medical Center there were doctors who were employed by another doctor? Did that have any effect or cause you concern at all? A. None whatsoever.

Q. Mr. Smith, during your tenure as chief executive officer at Indiana Hospital, did you become aware of any facility located within Indiana County other than the Indiana Hospital that provided [709] radiology services? A. I don't recall any.

Q. During your tenure as the chief executive officer at Indiana Hospital, did you become aware of any facility located within Indiana County other than Indiana Hospital that provided laboratory services such as for the analysis of urine and blood and the like, laboratory analysis? A. I can't recall any specific ones.

Q. During your tenure as chief executive officer at Indiana Hospital, did you become aware of any facility located within Indiana County that provided services for surgical operations other than operations that could be done by a doctor in his or her own office? A. I can't recall.

Q. During your tenure as the chief executive officer in Indiana Hospital, did you become aware of any facility located within Indiana County that provided health care services to patients who were admitted for overnight stays? A. I can't recall any.

MR. SILVERMAN: They were admitted to

* * *

MOTION FILED
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No. 92-1037

IN THE

Supreme Court of the United States

October Term, 1992

RALPH J. MILLER, M.D.,

Petitioner,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HEALTH; H. ARNOLD MULLER, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* SEMMELWEIS SOCIETY, IN SUPPORT OF PETITIONER

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Semmelweis Society

January 11, 1993

Batavia Times Publishing Co.
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Respondents.

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, RALPH J. MILLER, M.D.

AND NOW, comes the Semmelweis Society, *amicus curiae, pro se,* and files the following Motion for Leave to File a Brief *Amicus Curiae* in Support of Petitioner, Ralph J. Miller, M.D.

1. The Semmelweis Society is a non-profit corporation whose physician members share a common commitment to fair treatment of doctors in hospital peer review and privilege matters. The Society is comprised of physicians throughout the United States who have been aggrieved by bad faith, economically motivated peer review. The Society is dedicated to ensuring that the peer review process is not used to driving competent doctors from the practice of medicine in their chosen field and geographic region by the denial or revocation of their hospital privileges for reasons having nothing to do with the improvement of quality of medical care.

2. The use of the peer review system for anti-competitive purposes is a frequent occurrence with wide-ranging negative implications for the availability of affordable quality medical care throughout the United States. While the legal issues have been discussed in Dr. Miller's Petition for Writ of Certiorari, the breadth of the problem and the importance of the interests impacted by bad faith peer review have not been addressed.

3. For the above reasons, the Semmelweis Society seeks to file a brief *amicus curiae* in support of Petitioner, Ralph J. Miller, M.D.

4. The Respondents have refused to consent to the filing of a brief *amicus curiae* by the Semmelweis Society.

5. A copy of the brief which the Society intends to file in the event that this Motion is granted is attached hereto as Exhibit A.

WHEREFORE, the Semmelweis Society, *amicus curiae*, requests that this Honorable Court grant its Motion for Leave to File a Brief *Amicus Curiae* in Support of Petitioner, Ralph J. Miller, M.D.

Respectfully submitted,

By: _____
Semmelweis Society, *Amicus Curiae, Pro Se*
Verner S. Waite, M.D., President
P.O. Box 2200
8051 Imperial Highway
Downey, California 90241
(310) 862-5900

EXHIBIT A

IN THE

Supreme Court of the United States

October Term, 1992

No. 92-1037

RALPH J. MILLER, M.D.,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SEMMELWEIS SOCIETY, *AMICUS CURIAE,* IN SUPPORT OF PETITIONER, RALPH J. MILLER, M.D.

INTEREST OF *AMICUS CURIAE*

The Semmelweis Society is a non-profit corporation whose physician members throughout the United States share a common commitment to the fair treatment of doctors in hospital peer review and privilege matters. The Society takes its name from the 19th century Hungarian physician, Ignaz Semmelweis, who was vilified by his colleagues and superiors in the medical profession because of his strongly held belief that physicians should wash their hands and use clean instruments before delivering babies and performing surgery. His life ended in disgrace for advocating views which ultimately led to the breakthroughs of Lister and Pasteur.

Semmelweis is remembered in history as the classic victim of abuse of power by fellow medical professionals to the detriment of society. The Semmelweis Society is dedicated to seeing that the peer review process in the United States is not used to drive competent doctors from practicing in the professional field and geographic area of their choice by the denial or revocation of their hospital privileges for reasons that have nothing to do with the improvement of the quality of medical care. The use of the peer review system—so prevalent in the health care industry—for anti-competitive purposes has been a long-standing concern of the Society. As a result of this concern, the Society has previously appeared before this Honorable Court as an *amicus curiae* in a brief supporting Dr. Timothy Patrick in the landmark antitrust case of *Patrick v. Burget*, 486 U.S. 94 (1988).

ARGUMENT

While the legal and factual issues particular to this case have been thoroughly addressed in the Petition for Writ of Certiorari, the magnitude of the problem of bad faith peer review—a problem so detrimental to the societal good and to the rights of patients to have access to the best and most affordable health care—has not been made clear. Accordingly, and because the courts' decisions in this case will have a dramatic impact upon peer review and the physicians and patients affected thereby, the Semmelweis Society respectfully submits this brief asking this Honorable Court to grant a writ of certiorari to review the potentially far-reaching decisions of the lower courts in the light of the persuasive and meritorious arguments set forth in Dr. Miller's Petition.

The members of the Semmelweis Society assert that quality as well as price fairness to the paying consumer of health care services is best achieved through vigorous competition. Through personal experience, the members of the Society know only too well that the health care market has been dominated for many years by practices which are anti-competitive and, which, consequently, have denied market entry to skilled practitioners, stifled innovation and alternative methods of health care delivery, and destroyed operations designed to allow prices to be dependent upon competitive forces of the marketplace. Many of the anti-competitive ills of the health care marketplace emanate from peer review processes such as that found in the case now before this Court.

The Semmelweis Society strongly believes that the facts of this case serve to underscore the destructive and insidious nature of bad faith peer review decisions. For it

is within the peer review setting, where competitors review the services of other competitors, that decisions are routinely made in hospitals across the United States which drastically affect the practices and livelihoods of physicians and which unfortunately but frequently emanate from anti-competitive motives. In this case, moreover, the conduct of the Respondents is so outrageous and flagrantly anti-competitive that this Court should afford Dr. Miller's Petition the degree of careful consideration commensurate with society's obvious interest in preventing and curing such professional and judicial injustices. Indeed, this Court should demonstrate a healthy skepticism toward the entry of summary judgment in any antitrust case in which the evidence of anti-competitive motive and effect is as blatant as in the case now before the Court.

Peer review is the cutting tool for economic control in the medical profession. It allows for the creation and maintenance of monopolies. The painful truth is that many within the health care marketplace have been ready and willing to utilize this tool for anti-competitive ends. Data collected and analyzed by the Semmelweis Society indicates that as much as 80% of peer review decisions are dictated by economic concerns. In such an environment, the ideal of competitive health care practices with resultant cost containment and quality improvement can barely be expected to survive, let alone flourish. Conduct such as that of the Respondent in this case, and judicial decisions such as those of the lower courts in this case, can only serve to perpetuate this stifling environment. Accordingly, this Honorable Court should intervene by granting the Petition for Writ of Certiorari. As Edmund Burke once staed, "The only thing necessary for the triumph of evil is for good men to do nothing."

CONCLUSION

For the foregoing reasons, the Semmelweis Society, as *amicus curiae,* urges this Honorable Court to grant the Petition for Writ of Certiorari of Ralph J. Miller, M.D.

Respectfully submitted,

By: _____

Semmelweis Society, *Amicus Curiae, Pro Se*
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o Se

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No. 92-1037

MOTION FILED

JAN 12 1993

IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* VIRGINIA RAY AND JAMES E. WHITE, IN SUPPORT OF PETITIONER

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January

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9 pp

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Petitioner,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HEALTH; H. ARNOLD MULLER, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER, RALPH J. MILLER, M.D.

AND NOW, come M. Virginia Ray and James E. White, *amici curiae, pro se,* and file the following Motion for Leave to File a Brief *Amici Curiae* in Support of Petitioner, Ralph J. Miller, M.D.

1. M. Virginia Ray is the daughter of Joseph D. White, deceased, and resides at 1776 Overlook Drive, Ambridge, Beaver County, Pennsylvania 15003. James E. White is the son of Joseph D. White, and resides in Indiana County, Pennsylvania.

2. M. Virginia Ray and James E. White seek to file a brief *amici curiae* in support of Petitioner, Ralph J. Miller, M.D. Respondents have refused to consent to the submission of a brief *amici curiae* by Mrs. Ray and Mr. White.

3. Mrs. Ray and Mr. White are interested in this matter because Joseph D. White was their father and his death was the occurrence which ostensibly led to the initial request for revocation of Dr. Miller's medical staff privileges at Indiana Hospital. Moreover, they believe that the care and treatment rendered by Dr. Miller to their father was satisfactory in all respects and that the charges against Dr. Miller and the revocation of his staff privileges were an injustice.

4. This case will affect the interests of Mrs. Ray, Mr. White and other similarly situated in present and future actions concerning peer review decisions; the interests of patients in patient-physician relationships will also be affected by the decision of this Honorable Court.

5. A copy of the brief which Mrs. Ray and Mr. White intend to file in the event that this Motion is granted is attached hereto as Exhibit A.

WHEREFORE, M. Virginia Ray and James E. White respectfully request this Honorable Court to grant their Motion for Leave to File a Brief *Amici Curiae* in Support of Petitioner, Ralph J. Miller, M.D.

Respectfully submitted,

By: _____
M. Virginia Ray, *Amicus Curiae, Pro Se*
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By: _____
James E. White, *Amicus Curiae, Pro Se*
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Indiana, Pennsylvania 15701
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EXHIBIT A

IN THE

Supreme Court of the United States

October Term, 1992

No. 92-1037

RALPH J. MILLER, M.D.,

Petitioner,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HEALTH; H. ARNOLD MULLER, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR M. VIRGINIA RAY AND JAMES E. WHITE, *AMICI CURIAE*, IN SUPPORT OF PETITIONER, RALPH J. MILLER, M.D.

INTEREST OF *AMICI CURIAE*

M. Virginia Ray is the daughter of Joseph D. White, deceased, and resides at 1776 Overlook Drive, Ambridge, Beaver County, Pennsylvania 15003. James E. White is the son of Joseph D. White, and resides in Indiana County, Pennsylvania. Mrs. Ray and Mr. White are interested in this matter because Joseph D. White was their father and his death was the occurrence which ostensibly led to the initial request for revocation of Dr. Miller's medical staff privileges at Indiana Hospital. Moreover, they believe that the case and treatment rendered by Dr. Miller to their father was satisfactory in all respects and that the charges against Dr. Miller and the revocation of his staff privileges were an injustice.

This case will affect the interests of Mrs. Ray, Mr. White and others similarly situated in present and future actions concerning peer review decisions; the interests of patients in patient-physician relationships will also be affected by the decision of this Honorable Court.

ARGUMENT

M. Virginia Ray and James E. White are daughter and son, respectively, of Joseph D. White, whose death while a patient at Indiana Hospital ostensibly led to the revocation of Dr. Miller's privileges as a staff physician at Indiana Hospital.

On February 13, 1977, Joseph D. White, age 81, was taken to the Indiana Hospital emergency room by Mr. Virginia Ray and James E. White following an illness of several weeks' duration, during which time Joseph White had refused medical treatment and had deteriorated to a poor state of health. He was examined by Dr. Lee Dippery, an emergency room physician, who then admitted him to the care of Dr. Miller, a board-certified urologist, after conferring with Dr. Miller by telephone. On February 16, 1977, Joseph White died of cardiac arrest following an unsuccessful resuscitation attempt supervised by one of the Respondents, Melvin C. Williams, M.D. Subsequently, Respondent Williams, who was an employee of the hospital, filed a request with the medical staff executive committee for the suspension or revocation of Dr. Miller's hospital privileges, allegedly over concerns for the quality of care provided by Dr. Miller to Joseph White. Details of the events which followed that request and which led to the revocation of Dr. Miller's hospital privileges and to the assassination of his professional and personal character in the Indiana County community may be found in the Statement of the Case in Dr. Miller's Petition for Writ of Certiorari.

Mrs. Ray and Mr. White were completely satisfied with the medical care provided by Dr. Miller and they were shocked and angered by the hospital's use of their father's case to persecute Dr. Miller. In addition, seven highly qualified physicians testified in support of Dr.

Miller at the hearings conducted by the hearing committee of the medical staff in 1977. By contrast, only one physician was called in support of Dr. Williams' charges that Dr. Miller's care was substandard; it was later revealed that this witness was a divorce client of the lawyer prosecuting Miller at the hearings. Curiously, Dr. Williams never came forward to testify against Dr. Miller, despite the fact that he had triggered the entire series of events.

The action of a hospital in terminating the staff privileges of a physician has a tremendous affect on the rights of patients to be treated by the physician of their choice, especially in an area where the hospital possesses a virtual monopoly. The actions of the Respondents in this case effectively prevented patients of Indiana Hospital—the only hospital in the county—from engaging Dr. Miller's services in his specialty of urology and reduced to one the number of urologists with hospital privileges in Indiana County, thereby completely eliminating consumer choice for such services. Moreover, the Petition for Writ of Certiorari indicates that the actions of the Respondents not only had little, if anything, to do with quality of care concerns, but rather were undertaken with the intent of entrenching the Respondents' economic power by eliminating Dr. Miller and his fledling multi-specialty, ambulatory care center as viable competitors.

Inasmuch as the anti-competitive actions of the Respondents have been ratified by the decisions of the lower courts and would similarly be ratified by this Honorable Court should the Petition for Writ of Certiorari be denied, M. Virginia Ray and James E. White respectfully request that this Court grant review of the order of the Court of Appeals for the Third Circuit and the issues raised in Dr. Miller's Petition.

CONCLUSION

For the foregoing reasons, M. Virginia Ray and James E. White, as *amici curiae*, request that this Honorable Court grant the Petition for Writ of Certiorari of Ralph J. Miller, M.D.

Respectfully submitted,

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